IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 168

GUY CARLETON DENNEY, *Petitioner,*

vs.

THE FORT RECOVERY BANKING COMPANY,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION AND BRIEF.

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CASES AND AUTHORITIES CITED.

STATUTES CITED.

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PETITION

For a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

All emphasis in the following petition and brief is supplied unless otherwise noted. The brief in support of the petition begins at page 15.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

A Summary Statement of the Matter Involved

The Statutes.

The question which is presented arises out of the redemption provisions of the farmer debtor law, Section 75 of the Bankruptcy Act, 11 U.S.C. 203.

The particular statutes which are involved are:

(1) The following portion of Section 75(s)(3):

> Section 75(s)(3): "At the end of three years, or prior thereto **the debtor may pay into court** the amount of the appraisal of the property . . . and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor:" . . .

(2) That portion of Sections 38 and 39 of the Bankruptcy Act, 11 U.S.C. 66 and 67, which follows:

> Section 38: "Referees are hereby invested **subject always to a review by the judge,** with jurisdiction to" exercise certain enumerated powers.
>
> Section 39(a): **"Referees shall . . . prepare promptly and transmit to the clerks certificates on petitions for review** of orders made by them" . . .
>
> (c) "A person aggrieved by an order of a referee may . . . file with the referee a petition for review of such order by a judge" . . .

The Subject Matter.

At a meeting before the judge of the bankruptcy court, attended by the farmer debtor and the respondent, on February 17, 1942, when about half of the three year moratorium under Section 75(s)(2) had elapsed, it was agreed that the farmer debtor should be permitted to redeem his farm for $8680 within six months. See clerk's docket entry of February 17, 1942, at R. 64, bottom of page. Four months later on June 17, 1942, a journal entry, which was **not approved by the farmer debtor or by his counsel** but was approved by counsel for the respondent and signed by the District Judge, was put on. The entry recited:

> "That said Bankrupt waive his right of re-appraisement, and that said debtor or Bankrupt be permitted to redeem said property as described in his petition for eight thousand, six hundred and eighty dollars ($8680.00), to be paid into court on or before August 17th, 1942. On default thereof, said land to be sold."

This entry appears in full at R. 8. It will be noted that the words "On default thereof, said land to be sold" were not in the memorandum which appears in the clerk's docket entry of February 17, 1942, at R. 64.

Thereafter the farmer debtor filed an application in the bankruptcy court (R. 9 to 15) praying that he be permitted to have his full three year moratorium and that a rental order be reviewed upon his pending petition for review. He explained that the reason for his consent to the agreement of February 17, 1942, (R. 64), which was included in the entry of June 17, 1942 (R. 8) was as follows:

On September 4, 1940, the conciliation commissioner had entered **a rental order providing for rental to be paid for a period of seven years** (1937 to 1943 inclusive). R. 9 and 10. This order of course was a violation of Section 75(s)(2), which prescribes three years rental following

the entry of the order. The order called for rental to be paid for the antecedent period of three years and eight months and for three years and four months subsequent thereto.

His counsel had duly filed with the conciliation commissioner a petition for review with an assignment of errors and brief. R. 11 to 13. No action was ever taken by the court on the petition for review.

At the February 17 meeting before the court the farmer debtor and his counsel for the first time learned that there was no evidence or record anywhere in the court that any petition for review had ever been filed. Nor could the original be found.[1]

The respondent had then on file a petition to liquidate the farm.[2] The farmer debtor being suddenly confronted with the startling information that no petition for review was on file and believing he had no remedy against the seven year rental order and expecting that, under the existing conditions of easier credit because of the existing war inflation, he could borrow the money he needed, consented to an order being entered permitting him to redeem

---

[1] The enigma of the "lost petition for review" was later solved by the discovery of an original letter from the conciliation commissioner in which he said: "We have your application for appeal, which will be certified to the District Court in a day or two." R. 42, last paragraph of the letter of September 17, 1940. Although the record contains other references to this subsidiary subject, some of them relating to matters which occurred subsequent to the notice of appeal, the due filing of the petition for review is established.

[2] This was the seventh of a total of eight applications by the present respondent to terminate the proceeding in one way or another. See R. 62 to 66, and R. 69 to 71, entries of May 6, May 28, and June 9, 1937; September 3 and December 1, 1938; June 8, 1940; September 18, 1941; September 18, 1942. Of these applications one, that of June 9, 1937, was successful in the District Court but was reversed in **Denney v. Fort Recovery Banking Company**, 1938, CCA 7, 99 Fed. (2d) 712. The mandate is noted at R. 63, entry of November 15, 1938. The seventh and eighth are involved in this petition for certiorari.

within six months. R. 13, beginning at folio 12. R. 64 docket entry of February 17, 1942. R. 8, the judge's entry of June 17, 1942, four months later.

In his application, he further apprised the court that "after diligent endeavor to obtain sufficient money" he was unable to do so. R. 14, second full paragraph. He prayed that he have the benefits of the full three year moratorium and that the rental order be revised pursuant to his pending petition for review. R. 14, bottom of page.

On the day the farmer debtor's application for the full three year moratorium was heard, that is on September 18, 1942, the respondent filed its eighth application to terminate the proceeding, by liquidation. R. 65, entry of September 18, 1942. R. 15. This application for liquidation was granted without any hearing in the same order that denied the application for the full moratorium and for a revision of the rental order. R. 36 to 39. **The sole ground for this final order is stated in the words: "The Court finds that the time for redemption has expired and said debtor has failed to so redeem said lands."** R. 37, at folio 35. The appeal was taken from this final order both as a granting of the application to liquidate and as denying the application for the full moratorium and for a review of the rental order. R. 47, folio 47.

The opinions of the District Court, of which there were three, are found at R. 29 to 32; R. 45 to 47; and R. 55. The last opinion at R. 55 was rendered after the appeal was taken. R. 47. R. 55. Only the first opinion at R. 29 to 32 has been reported. It is *Denney* v. *Fort Recovery,* 1942, 47 Fed. Supp. 36.

The opinion of the Seventh Circuit Court of Appeals in affirming the District Court is at R. 92 to 96 and is reported as *Denney* v. *Fort Recovery Banking Company,* 1943, 135 Fed. (2d) 184.

II.

Statement of the Basis of the Jurisdiction of this Court.

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code; 28 U.S.C. 347 (a).

The petitioner has complied with Section 8 (a) of the Act of February 13, 1925; 28 U.S.C. 350. The final judgment of the court below (R. 97) was entered on April 19, 1943, and this petition for certiorari is filed within three months thereafter.

III.

The Questions Submitted.

1.

Section 75(s)(2) provides that "At the end of three years, or prior thereto, **the debtor may pay into court** the amount of the appraisal of the property" . . . etc., whereby the proceeding is terminated by the redemption of the property cleared of all encumbrances. Question: If the bankruptcy court enters an order that the farmer debtor "be permitted to redeem said property" for a stated sum to be paid into court short of three years "On default thereof said land to be sold" (R. 8), but the farmer debtor fails to pay said sum into court within such shortened period, may the court for that reason terminate the proceeding?

2.

Before the three year moratorium under Section 75(s) has run its course may the bankruptcy court accelerate its termination by entering an order stating that the farmer debtor is "permitted to redeem said property" before the end of the three years "On default thereof said land to be sold"?

3.

When a farmer debtor, before the end of the three year moratorium, does not "pay into court" the value of the property under Section 75(s)(3), may the moratorium be ended merely because the bankruptcy court has ordered that he "be permitted to redeem," "On default thereof, said land to be sold," and he does not so redeem.

4.

Considering the following portion of Section 75(s)(3):

> "**At the end of three years, or prior thereto, the debtor may pay into court** the amount of the appraisal of the property . . . and thereupon the court shall . . . turn over full possession and title" . . .

may it be administered as if it read as follows:

> "At the end of three years, or prior thereto, **or within such shorter time as the court may fix,** the debtor may pay into court the amount of the appraisal of the property, and thereupon the court shall . . . turn over full possession and title **and in default of such payment within such shorter time fixed by the court, the property may be ordered sold.**"?

5.

If a farmer debtor requests of the bankruptcy court and is granted permission to redeem his farm before the three year moratorium has run, but is unable to pay the money into court, may the court liquidate his farm for his failure to redeem?

6.

When a farmer debtor, being aggrieved by an order of a conciliation commissioner, duly files with the conciliation commissioner his petition for review under Section 75 of the Bankruptcy Act and the conciliation commissioner does not transmit to the clerk his certificate on review may the farmer debtor so aggrieved be deprived of his right to a review by the judge?

IV.

Reasons Relied Upon for Allowance of a Writ of Certiorari.

1.

This case presents an important question with respect to the procedure required by Section 75(s)(3), namely whether the provision that the farmer debtor can shorten the three year moratorium if he "**pay into court**" the value of his farm, may be modified by an order of the bankruptcy court whereby the farmer debtor is "permitted to redeem" short of such three years and the farm is ordered sold if he fails to do so?

2.

It presents as a question of procedure whether a bankruptcy court may shorten the three year stay under Section 75(s) by ordering the farmer debtor to redeem before that period has expired under penalty of having his farm sold if he does not so redeem.

3.

It presents the procedural question of whether the consent by a farmer debtor that the bankruptcy court shall enter an order that he be permitted to redeem his farm on penalty of being sold out if he fail to pay the money into court, empowers the court to order his farm sold prior to the end of the three year moratorium, if he does not "pay into court" the value of his farm as provided in Section 75(s)(3).

4.

It presents a question of importance in the problem of the orderly administration of the farmer debtor law.

5.

It presents a question of importance in the administration of the Bankruptcy Act, namely whether a person who is aggrieved by an order of a referee may be deprived of his statutory right to have such order reviewed by the judge because the referee does not certify to the clerk the petition for review duly filed with the referee.

6.

The final orders of the lower courts are in conflict with the statutory provision of Section 75(s) that the moratorium runs for three years unless the farmer debtor chooses to shorten under Section 75(s)(3) it by electing to "pay into court" the value of his farm. Here the lower courts sought to amend this vital provision, which gives to the farmer debtor alone the power to shorten the moratorium.

7.

They are in conflict with the decision of this court in *Adair* v. *Bank,* (1938), 303 U.S. 350, at page 355, where it was held in adjudicating Section 75(s) that:

> . . . "further opportunity for rehabilitation is afforded the debtor, through provisions enabling him **to retain possession under conditions favorable to its ultimate redemption by him.**"

8.

They conflict with the decision of this court in *John Hancock* v. *Bartels,* (1939) 308 U.S. 180. There the district court denied a moratorium to the farmer debtor because there was "no hope or expectation" of ultimate rehabilitation and this court sustained a reversal of it. Here the district court granted "permission" to the farmer debtor to redeem at a fixed date before the end of the moratorium and then ordered his farm sold solely because (quoting the final order) "the time for redemption has expired, and said debtor has failed to so redeem said lands." R. 37, folio 35.

9.

They conflict with the decision of this court in *Borchard* v. *California Bank,* 1940, 310 U.S. 311, reversing an order of the district court which found "the debtors had had several years within which to arrange an adjustment" and for that reason ordered the property sold before any moratorium had run. Here the district court ordered the property sold, upon the ground that "said debtor has failed to so redeem" as prematurely "permitted" by the court prior to the expiration of the statutory three year moratorium. In that case this court, at pages 316 and 317, said " 'The scheme of the statute [Section 75(s)] is designed to provide an orderly procedure' . . . That orderly procedure includes . . . the entry of a stay which will *assure* him of his possession for three years" . . .

10.

They are in conflict with the decision of this court reversing the Seventh Circuit in *Wright* v. *Union Central,* 1940, 311 U. S. 273, at page 281, where in referring to the termination of a farmer debtor proceeding under Section 75(s)(3), it was held that "such termination can be effected only pursuant to the precise procedure which Congress has provided."

11.

They conflict with the decision of this court reversing the Seventh Circuit in *Wright* v. *Logan,* 1942, 315 U. S. 139. In that case the farmer debtor proceeding had lain dormant for nearly five years because of the inaction of the bankruptcy court and when the farmer debtors filed an amended petition under Section 75(s) the bankruptcy court denied

it and terminated the case. This court reversed the lower courts, saying, at page 181:

> "Section 75(s) does not by its language condition a farmer's right to adjudication upon the diligence with which he has sought to obtain composition or extension under subsections (a) to (r). It 'applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts.' *John Hancock Ins. Co.* v. *Bartels,* 308 U.S. 180, 184. That was the situation of the farmers here. And 'the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress . . . lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.' *Wright* v. *Union Central Ins. Co.,* 311 U.S. 273, 279. Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes. *Cf. Borchard* v. *California Bank,* 310 U.S. 311. We think the *Bartels,* [308 U.S. 180], *Wright,* [311 U.S. 273] and *Borchard* [310 U.S. 311], cases control our conclusion here, and that the court below was in error in dismissing the applications for adjudication under 75(s)."

Here the lack of diligence was in the court, as in the *Logan* case.

12.

The decisions of the lower courts are in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Bankers* v. *Havel,* (1942), CCA 8, 129 Fed. (2d) 106, where that court said in the last paragraph:

"**That the statute assures to the debtor possession for three years** from the date of the order upon the conditions mentioned in the Act **is no longer open to debate**" citing the decisions of this court in *Borchard* v. *California Bank,* 1940, 310 U.S. 311; *John Hancock* v. *Bartels,* 1939, 308 U.S. 180; and *Wright* v. *Union Central,* 1940, 311 U.S. 273."

13.

They conflict in the same respect with the decision of the United States District Court for the Southern District of Iowa in *In re McClenahan,* 1941, 41 Fed. Supp. 694.

14.

They are in conflict with the decision of the Eighth Circuit in *Rafert* v. *Conway,* 1941, CCA 8, 119 Fed. (2d) 102, where it was held that when a farmer debtor proceeding has passed under Section 75(s) there is no power to deprive the farmer debtor of his lands except in strict compliance with the statute liberally construed so as to effectuate the legislative intent.

15.

They are also in conflict with the decision, announced May 24, 1943, of the Ninth Circuit in *Corey* v. *Blake,* which is published in the July 9, 1943, issue of the Bankruptcy Law Service as paragraph 54419. That Circuit Court of Appeals reversed the District Court and the conciliation commissioner below and held that observance of the orderly procedure required by this court in the *Bartels* and in the *Borchard* cases was not followed when the bank-

ruptcy court based its proceedings under Section 75(s) upon a stipulation of the parties.

Wherefore your petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit directing that it certify and send to this court a transcript of the record and proceedings so that this cause may be determined by this court and for all other relief as is proper.

Respectfully submitted,

Lima, Ohio
June 11, 1943

ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner.

BRIEF.

In Support of the Petition for Certiorari.

The index precedes the petition for certiorari.

I.

The Reports of the Decisions Below.

The appellate court's opinion is reported as *Denny* v. *Fort Recovery Banking Company,* 1943, 135 Fed. (2d) 184.

There were three opinions of the district court which appear in the record at: R. 29 to 32; R. 45 to 47 and at R. 55. Of these only the first, that at R. 29 to 32, has been reported. It is *Denney* v. *Fort Recovery Banking Company,* 1942, 47 Fed. Supp. 36.

II.

Grounds on Which the Jurisdiction of this Court is Invoked.

The statutory basis of the jurisdiction of this court has been stated at page 6 of the preceding petition.

The grounds relied upon for invoking the jurisdiction of this court have been stated at pages 8 to 13 of the preceding petition. In recapitulation they are:

That the district court unlawfully accelerated the termination of the three year moratorium under Section 75(s)(3) by granting a permit to the farmer debtor to redeem short of three years and then ordering his farm sold for failure to so redeem.

That the district court in violation of Section 75(s)(3) ordered the farmer debtor's farm sold for the sole reason that he had not redeemed it at a time before the expiration of the statutory moratorium period—said time having been set by the district court by granting a permit to so redeem with a proviso that if he did not do so the farm would be sold.

That the district court violated Section 75(s)(3) in holding that a farmer debtor by consenting to the entry of an order permitting him to redeem before the three year moratorium had run, waived the statutory provision that only the farmer debtor can shorten the three year moratorium by paying into court the value of his farm.

That the district court violated the statutory provisions in Sections 38 and 39 of the Bankruptcy Act, 11 U.S.C. 66 and 67, which provide that orders made by referees are always subject to review by the judge and that referees shall promptly prepare and transmit certificates on review of petitions for review filed by persons aggrieved at such orders.

That the district court violated Section 75(s)(3) in refusing to grant the application of the farmer debtor for the full three year moratorium after he had found it impossible to pay into court the value of his farm before the three years had run as he had believed and informed the court he could do.

That important questions of procedure under Section 75 of the Bankruptcy Act, 11 U.S.C. 203, are involved.

That important questions of procedure under Sections 38 and 39 of the bankruptcy Act, 11 U.S.C. 66 and 67, are also involved.

That the orders of the lower courts conflict with Section 75(s)(3) of the Bankruptcy Act, 11 U.S.C. 203, and with Sections 38 and 39 of the Bankruptcy Act, 11 U.S.C. 66 and 67.

That the orders of the lower courts are in conflict with the decision of this court in *Adair* v. *Bank,* 1938, 303 U.S. 350, at page 355 where it was held in adjudicating Section 75(s) that:

> . . . "Further opportunity for rehabilitation is afforded the debtor, through provisions enabling him to retain possession under conditions favorable to its ultimate redemption by him."

That they conflict with the decision of this court in *John Hancock* v. *Bartels,* 1939, 308 U.S. 180, where the district court denied a moratorium to the farmer debtor because there was "no hope or expectation" of ultimate rehabilitation and this court sustained a reversal of it. Here the district court granted "permission" to the farmer debtor to redeem at a fixed date before the end of the moratorium and then ordered his farm sold solely because (quoting the final order) "the time for redemption has expired, and said debtor has failed to so redeem said lands." R. 37, folio 35.

That they also are in conflict with the decision of this court in *Borchard* v. *California Bank,* 1940, 310 U.S. 311, reversing an order of the district court which found "the debtors had had several years within which to arrange an adjustment" and for that reason ordered the property sold before any moratorium had run. In this case the district court ordered the property sold, upon the ground that "said debtor has failed to so redeem" as prematurely "permitted" by the court prior to the expiration

of the statutory three year moratorium. In the *Borchard* case this court, at pages 316 and 317, said " 'The scheme of the statute [Section 75(s)] is designed to provide an orderly procedure' . . . That orderly procedure includes . . . the entry of a stay which will **assure** him of his possession for three years" . . .

They also conflict with the decision of this court in *Wright* v. *Union Central,* 1940, 311 U.S. 273, at page 281, where in referring to the termination of a farmer debtor proceeding under Section 75(s)(3), it was held that "such termination can be affected only pursuant to the **precise procedure** which Congress has provided."

They also conflict with the decision of this court in *Wright* v. *Logan,* 1942, 315 U.S. 139, where the farmer debtor proceeding had lain dormant for nearly five years because of the inaction of the bankruptcy court and when the farmer debtors filed an amended petition under Section 75(s) the court denied it and terminated the case. This court reversed the lower courts, saying, at page 181:

> "Section 75(s) does not by its language condition a farmer's right to adjudication upon the diligence with which he has sought to obtain composition or extension under subsections (a) to (r). It 'applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts.' *John Hancock Ins. Co.* v. *Bartels,* 208 U.S. 180, 184. That was the situation of the farmers here. And 'the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress . . . lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.' *Wright* v. *Union Central Ins. Co.,* 311 U.S. 273, 279. Farmers

cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes. *Cf. Borchard* v. *California Bank,* 310 U.S. 311. We think the *Bartels,* [308 U.S. 180], *Wright,* [311 U.S. 273], and *Borchard* [310 U.S. 311], cases control our conclusion here, and that the court below was in error in dismissing the applications for adjudication under 75(s)."

In the *Logan* case, as in this case, the lack of diligence was that of the court.

They conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Bankers* v. *Havel,* (1942), CCA 8, 129 Fed. (2d) 106, where that court said in the last paragraph:

"That the statute assures to the debtor possession for three years from the date of the order upon the conditions mentioned in the Act is no longer open to debate" citing the decisions of this court in *Borchard* v. *California Bank,* 1940, 310 U.S. 311; *John Hancock* v. *Bartels,* 1939, 308 U.S. 180; and *Wright* v. *Union Central,* 1940, 311 U.S. 273.

They are also, in the same respect in conflict with the decision of the United States District Court for the Southern District of Iowa in *In re McClenahan,* 1941, 41 Fed. Supp. 694.

They further conflict with the decision of the Eighth Circuit in *Rafert* v. *Conway,* 1941, CCA 8, 119 Fed. (2d) 102, where it was held that when a farmer debtor proceeding has passed under Section 75(s) there is no power to deprive the farmer debtor of his lands except in strict compliance with the statute liberally construed so as to effectuate the legislative intent.

They are also in further conflict with the decision of the Ninth Circuit in *Corey* v. *Blake,* decided May 24, 1943, and presently published in the July 9, 1943, issue of the Bankruptcy Law Service as paragraph 54419. Reversing the District Court and the conciliation commissioner below that Circuit Court of Appeals held that the orderly procedure of the statute which was referred to by this court in the *Bartels* and *Borchard* cases was not followed by the bankruptcy court when it based its proceedings under Section 75(s) upon a stipulation by the parties.

III.

Statement of the Case.

The application for liquidation from which this petition for certiorari stems is one of a series of eight such applications made by the respondent seeking to end the farmer debtor proceeding. The petition under Section 75(a) to (r) was filed March 31, 1937. The first "motion to dismiss" was filed on May 6, 1937. The proceeding lay practically dormant from May 28, 1937, when the second such application was filed, until November 15, 1938, when the mandate of the appellate court reversing an order of dismissal was received in the district court. *Denney* v. *Fort Recovery,* 1938, 99 Fed. (2d) 712. Two weeks later, on December 1, 1938, the respondent resumed its attack by an "Amended Petition to Dismiss." During the rest of 1938, all of 1939, and nearly six months of 1940, the proceeding again lay dormant. It was not until nearly three years after the petition was filed that an order of adjudication was entered. On June 15, 1940, the clerk's docket recites:

> "All petitions to dismiss withdrawn by creditor. Debtor ordered adjudicated as bankrupt. Cause ordered referred to conciliation commissioner."

For the outline of the foregoing history, as entered in the clerk's docket and in the conciliation commissioner's docket, see:

(1) R. 62, Clerk's docket entry of May 6, 1937.
(2) R. 70, top of page, Conciliation Commissioner's docket entry of May 28, 1937.
(3) R. 62, Clerk's docket entry of June 9, 1937.
(4) R. 63, Clerk's docket entry of September 3, 1938.
(5) R. 63, Clerk's docket entry of November 15, 1938.
(6) R. 64, Clerk's docket entry of June 8, 1940.
R. 64, Clerk's docket entry of June 15, 1940.
R. 64, Clerk's docket entry of June 20, 1940.
(7) R. 64, Clerk's docket entry of September 18, 1941.
(8) R. 65, Clerk's docket entry of September 18, 1942. 1942.

A rather general statement of the case relative to the specific issues raised here has been related under the heading "The Subject Matter" at pages 3 to 5 of the proceeding Petition for Certiorari.

Somewhat tersely stated the facts relating to the points involved are:

(1) The judge of the bankruptcy court granted permission to the farmer debtor to redeem his farm for a stated sum to be paid by a named date prior to the expiration of the three year stay period. Four months later the court put on an entry approved by the mortgage holder but not by the farmer debtor. When the farmer debtor failed to pay the sum into court on the day named the court ordered the farm sold upon the ground that the time for redemption had expired. R. 64, clerk's docket entry of February 17, 1942. R. 8. R. 37, folio 35. It should be said that the provision "on default thereof, said land to be sold" in the en-

try of June 17, at R. 8, is not in the memorandum of the permission to redeem which was put on the clerk's docket on February 17 when the permission was granted.

(2) The conciliation commissioner entered an unlawful order for the payment of rent over a period of seven years beginning more than three years before and ending more than three years after the entry of the order. A petition for review of that order was duly filed but was never certified to the judge for review. R. 41. R. 42, last paragraph preceding folio 40.

(3) Without being set down for hearing and without any hearing the court granted an application by the respondent mortgage-holder to sell the farmer debtor's farm. R. 66, entries of September 18, 1942, to October 7, 1942, inclusive.

IV.

Specification of Errors.

1.

Denial of the farmer debtor's application for the full three year stay and for an opportunity to redeem as provided in Section 75.

2.

Holding that permission granted by the bankruptcy court to the farmer debtor to redeem his farm, at a stated valuation, before the expiration of the statutory stay under Section 75 required him to do so or have his farm sold upon the ground that his time for redemption has expired.

3.

Holding that if a farmer debtor fails to pay into court the valuation of his farm before the three year stay provided in Section 75 has expired his farm should be sold.

4.

Holding that the statutory provision in Section 75(s)(3), that at the end of three years of the statutory stay a farmer may pay into court the value of his farm and so redeem it, may be shortened by issuing permission to him to redeem it by a named date short of such three years, and holding that his time for redemption has expired if he does not pay into court such value by such date.

5.

Holding that if a farmer debtor requests permission to redeem his farm under Section 75 by a named date prior to expiration of the three year stay therein provided, his period within which to redeem expires on said date.

6.

Holding that if a farmer consents to an order permitting him to redeem his farm prior to the expiration of the three year stay period under Section 75, he is thereby prohibited from redeeming it at the end of the three year period.

7.

Amending that part of Section 75(s)(3) which reads:

"**At the end of three years,** or prior thereto, the debtor may pay into court the amount of the appraisal

of the property . . . and thereupon the court shall . . . turn over full possession and title" . . .

as if it read:

"At the end of three years, or prior thereto, or **within such shorter time as the court may fix,** the debtor may pay into court the amount of the appraisal of the property, and thereupon the court shall . . . turn over full possession and title and **in default of such payment within such shorter time fixed by the court, the property may be ordered sold.**"

8.

Ordering the farmer debtor's farm liquidated for the reason that he requested and the court granted permission to redeem his farm before the three year stay expired and he did not do so by the date named by the court.

9.

Holding that the farmer debtor's time for redemption had expired, short of the three year stay period, because the court granted permission to the farmer debtor to redeem his farm prior to the expiration of such three year stay period and he did not do so.

10.

Violating Section 75(s)(3) which assures to the farmer debtor the right to redeem his farm up to the end of his three year stay period.

11.

Holding that the farmer debtor had violated an order of the court made pursuant to Section 75 when such order

granted permission to the farmer debtor to redeem his farm before the expiration of the three year stay period.

12.

Holding that the farmer debtor had failed to comply with the provisions of Section 75 because he did not redeem his farm by a date named by the court before the expiration of the three year stay.

13.

Holding that if a farmer debtor waives a right to reappraisment as provided in Section 75(s)(3) he must subsequently redeem his farm at its appraised value before the expiration of his three year stay.

14.

The failure to review the conciliation commissioner's order of September 4, 1940, pursuant to the farmer debtor's petition for review which was properly filed with the conciliation commissioner but not certified to the clerk of the court.

15.

Finding that counsel for the farmer debtor mailed to the farmer debtor to be filed with the conciliation commissioner a petition for review and assignment of errors pertaining to the conciliation commissioner's order of September 4, 1940, and that the farmer debtor failed and neglected to file them with the conciliation commissioner.

16.

Finding that the farmer debtor did not file a petition for review and assignment of errors with the conciliation commissioner seeking review of the conciliation commissioner's order of September 4, 1940.

17.

Holding the farmer debtor guilty of contumacious conduct because he stated to the court that he filed with the conciliation commissioner his petition for review of the conciliation commissioner's order of September 4, 1940.

18.

Finding that the farmer debtor brazenly asserted that his counsel had filed with the conciliation commissioner his petition for review of the conciliation commissioner's order of September 4, 1940.

19.

Finding that the farmer debtor abandoned his farm.

20.

Finding that the farmer debtor approved the order entered June 17, 1942.

21.

Granting the application of the respondent to have the farmer debtor's farm liquidated without any hearing of such application.

V.

Summary of the Argument.

1.

The three year stay under Section 75(s) is as a clock that is wound to run for three years. Farmer debtors are guaranteed by the statute and they have been assured by this court that they have three years within which to redeem their farms.

So far as pertinent Section 75(s)(3) reads:

> "**At the end of three years, or prior thereto the debtor may pay into court** the amount of the appraisal of the property . . . and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor:" . . .

Borchard v. *California,* 1940, 310 U. S. 311, at pages 316 and 317:

> "The scheme of the statute [Section 75(s)] is designed to provide an orderly procedure" . . .
>
> "That orderly procedure includes . . . the entry of a stay which will **assure** him of his possession for three years" . . .

Redemption procedure can terminate the proceeding in only two ways, that is either:

(1) "**At the end of three years** . . . the debtor may pay into court" the value of his farm,

(2) . . . **or prior thereto** the debtor may pay into court" the value of his farm. The farmer debtor alone can stop the clock by redemption, and that he may do only if he "**pay into court.**"

The bankruptcy court may not inject a third method by a judicial amendment of the statute. The court below attempted to do so by giving the farmer debtor **permission** to pay into court the value of his farm prior to end of three years and then ordering his farm liquidated when he did not do so, on the ground that "the time for redemption has expired, and said debtor has failed to so redeem said lands" (The words here quoted are from the final order of the court at R. 37, folio 35.)

The mere fact that the farmer debtor consented to such "permission" does not shorten the stay if he does not "pay into court" the value of his property. Neither his consent nor such "permission" stops the three year clock. The farmer debtor consented to no more than that reappraisement be waived and that he have permission to redeem before the three year stay expired. He did not, as added in the formal entry, consent that "On default thereof, said land to be sold". See the clerk's docket entry of February 17, 1942, at R. 64, and the entry of June 17, 1942, at R. 8. As mute evidence that the entry of June 17 was not submitted to the farmer debtor there is a blank space for his approval.

2.

Under the bankruptcy statutes a person who is aggrieved by an order of a referee is entitled to have the order reviewed by the judge if he files with the referee a petition for review of such order. The failure of the referee to prepare promptly and transmit his certificate on the petition for review does not deprive the aggrieved person of his right to a review.

The applicable portions of the Bankruptcy Act read thus:

Section 38: "Referees are hereby invested **subject always to a review by the judge,** with jurisdiction" to exercise certain enumerated powers.

Section 39(a): **Referees shall . . . prepare promptly and transmit to the clerks certificates on petitions for review** of orders made by them" . . .

(c) "A person aggrieved by an order of a referee may . . . file with the referee a petition for review of such order by a judge" . . .

Although the farmer debtor duly filed with the conciliation commissioner his petition for review, it was never certified to the judge.

3.

The farmer debtor's constitutional right to due process of law was violated by the order of sale which was entered without any hearing upon the issues raised by the respondent's application therefor and the farmer debtor's answer thereto.

The application of the respondent, as mortgage holder, for the appointment of a trustee and for an order to sell the farmer debtor's farm was filed September 18, 1942. R. 15 to 19. An answer creating distinct issues of fact was filed by the farmer debtor September 25, 1942. R. 20 to 23. This application and the answer to it were not set down for hearing and were never heard. R. 65, folio 72, entries of September 18, 1942 to October 7, 1942, inclusive.

VI.

ARGUMENT.

1.

The statute prescribes concisely how a farmer debtor proceeding is terminated by redemption. It is too explicit to admit of any doubt. It reads:

> "At the end of three years, or prior thereto the debtor may **pay into court** the amount of the appraisal of the property . . . and thereupon the court shall, by an order turn over full possession and title of said property, free and clear of encumbrances to the debtor:" . . .

The statutory prescription is clear. The farmer debtor does not by any act of his own less than the requirement that he **"pay into court"** shorten the stay period. He may **think** he will be able to "pay into court" before the expiration of three years but that is not **payment into court.** Even though the court put on an entry that he **"be permitted to redeem** . . . for . . . $8680, to be paid into court **on or before" the end of the three years** (R. 8) it is not **payment into court** and his three year stay is not thereby terminated.

Let it be perfectly clear that the denial by the bankruptcy court of the three year stay was founded upon the single ground that the farmer debtor failed to redeem within the time he was to be **"permitted to redeem".** The order of sale reads: "The court finds that the **time for redemption has expired and said debtor has failed to so redeem** said lands" by August 17, 1942. This was the date

named by the court in its order of June 17, 1942. See the order at R. 36 and 37. The words just quoted from the order appear in the first sentence at folio 35 of R. 37.

The Appellate Court based its affirmance of the bankruptcy court's order upon the same ground. The opinion of that court at R. 94, second and third full paragraphs from the top of the page, reads: "Since the appellant failed to redeem the property by August 17, 1942, the appellee on September 18, 1942, filed its petition for an order of sale and for the appointment of a trustee therefor. . . . On November 21, 1942, after a hearing, the court sustained the petition of the appellee, entered an order for sale and appointed a trustee." (Although it relates to the third point of the Argument in this case which has been stated in the Summary of the Argument at page 27 and is discussed at page 29 of this brief, it probably should be said here that the statement in the portion just quoted from the Appellate Court's opinion that the application for an order of sale and appointment of a trustee was granted "after a hearing" is in error. That application was never set down for hearing and it was never heard.)

The order of June 17, 1942, which named August 17, 1942, two months ahead, as the final date for redemption by permission of the court appears at R. 8. It appears there without approval by the farmer debtor as the original appears in the files of the court. The designation of the record particularly directed the clerk to include this order exactly as it appears.

> Appellant's Designation 11: "The order of the judge entered June 17, 1942. (The clerk will note that said order is *not* approved by the farmer debtor and *is* approved by the appellee and the clerk will please include the matter which will indicate the same.)" R. 49, Designation 11.

It is equally true that the farmer debtor orally consented that he be **"permitted to redeem"**. See entry on the Clerk's docket of February 17, 1942, at R. 64. Neither the consent nor the permission expressed anything more than the statutory provision that "At the end of three years, or prior thereto, debtor **may** pay into court". Section 75(s)(3). The formal entry of four months later on June 17, 1942, R. 8, added the words "On default thereof, said land to be sold" to which he did not consent. He did not approve the entry at R. 8.

This is not the first instance where it has been attempted to oust the farmer debtor from his statutory three year stay by some **substituted procedure.**

A subject very closely akin to this was before the court in *Borchard* v. *California Bank,* 1940, 310 U. S. 311, where for four successive crop seasons the farmer debtors entered into **written agreements** with the mortgage holder which were **embodied in court orders** whereby instead of paying rental into court, a sum of money out of each crop was paid by the farmer debtors directly to the mortgage holder.

At page 317 this Court said:

> "Instead of prosecuting the cause before the Conciliation commissioner pursuant to the debtors' petition, the bank resorted to **a procedure not contemplated by the statute,** evidently on the theory that it could obtain some advantage by that course."

We digress here momentarily to show the parallel in this *Denney* case. The Appellate Court's opinion at the

paragraph beginning at the bottom of R. 94, and running over to the top of R. 95, said:

> . . . "The statute has prescribed a certain procedure that must be followed **if the farmer debtor insists upon it.** It is not for the courts to point out or explore any short cuts. The court cannot *force* [the emphasis is that of the court] the farmer debtor to accept any procedure except that laid down in the statute. That is not to say that the farmer debtor may not come into open court with his attorney and understandingly and voluntarily agree to another procedure. He may deem it to his advantage to accept another procedure. This he is free to do, unless the farmer-debtor is to be considered a ward of the court, which view we do not accept. This being so, the appellant may waive a procedure which he may otherwise insist upon."

Also in the paragraph at the middle of R. 95 the Appellate Court said in this *Denney* case:

> "We think the appellant voluntarily, knowingly and advisedly consented to a procedure different from that laid down in the statute, and his conduct in this regard amounted to a waiver of his right to thereafter insist upon the letter of the statute."

It seems clear that the Borchards also "voluntarily, knowingly and advisedly consented to a procedure different from that laid down in the statute". They entered into **written stipulations** with the mortgage holder and the bankruptcy court issued orders based upon those written stipulations. This court disapproved and reversed the procedure in the *Borchard* case which that in this *Denney* case parallels.

We continue with the opinion in the *Borchard* case.

This Court said further at pages 316 and 317 of the *Borchard* opinion:

> "We are of the opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of Section 75(s). That this is so is made plain by our decisions in *Wright* v. *Vinton Branch of Mountain Trust Bank,* [300 U. S. 440]; and *John Hancock Ins. Co.* v. *Bartels,* 300 U. S. 180. As was said in the latter case (P. 187):
>
> > 'The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.'
>
> That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of **a stay which will assure him of his possession for three years** from the date of the order, upon the conditions mentioned in the Act."

In *John Hancock* v. *Bartels,* 1939, 308 U. S. 180, one of the grounds for terminating the proceeding was, as in this *Denney* case, that Bartels could not redeem. This Court said at:

> Pages 183 and 184: "We think that the District Judge failed to follow the **mandate of the statute** and that the Circuit Court of Appeals was right in reversing the judgment and ordering the proceeding to be reinstated.

Subsection (s) of Section 75 as amended by the Act of August 25, 1935, prescribes a **definite course of procedure.**"

Page 186: "Under paragraph (2), if there has been compliance with the statutory conditions, the court is directed to **stay all proceedings against the debtor or his property for a period of three years, and during that time the debtor may retain possession** of all or part of his property subject to the court's control, provided he pays a reasonable rental semi-annually."

Also at page 186: "**Then it is provided, in paragraph (3), that at the end of the three year period, or at any time before that, the debtor may pay into court the appraised value of the property . . .**" "**In that way, by the order of the court, the debtor may regain full possession and title of such property, . . .**"

Page 187: "**The scheme of the statute is designed to provide an orderly procedure** so as to give whatever relief may be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved. See *Wright* v. *Vinton Branch, supra; Adair* v. *Bank of America Association,* 303 U. S. 250, 354-357; *Wright* v. *Union Central Life Ins. Co.,* 304 U. S. 502, 516, 517."

In *Wright* v. *Union Central,* 1940, 311 U. S. 273, the farmer debtor had not paid rent as ordered by the court, to which rental order no petition for review was ever filed. The District Court ordered a sale of the farm and on appeal the order of sale was affirmed. The Appellate Court, relying upon Section 75(s)(3) and the decision of this court in *Wright* v. *Vinton,* 1937, 300 U. S. 440, said

the facts not only authorized the order of sale by the District Court but "made such action imperative." See the opinion of the Appellate Court in *Wright* v. *Union Central,* 1939, (CCA 7), 108 Fed. (2d) 361. The District Court which issued the order of sale in that case and the Appellate Court which affirmed it are the same courts which issued the order of sale and affirmed it in this case.

This court reversed the lower courts and said at page 278:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. *Wright* v. *Union Central Life Ins. Co.,* [304 U. S. 502]; *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180; *Kalb* v. *Feuerstein,* 308 U. S. 433. Safeguards were provided to protect the rights of secured creditors, through the proceedings, to the extent of the value of the property. *John Hancock Mutual Life Ins. Co.* v. *Bartels,* [308 U. S. 180], at pages 186-187; *Borchard* v. *California Bank,* [310 U. S. 311] at page 317. There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be reserved in its favor and against the debtor. Rather, **the Act must be liberally construed to give the debtor the full measure** of the relief afforded by Congress (*John Hancock Mutual Life Ins. Co.* v. *Bartels,* [308 U. S. 180]; *Kalb* v. *Feuerstein,* [308 U. S. 433]); **lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."**

Page 281: **"And to hold that the court has the discretion to deny or to grant the debtor's right** to redeem at the reappraised value or at the value fixed by the court, dependent on general equitable consid-

erations, **would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate.**"

This *Denney* case now before the Court is also in essence a replica of *Wright* v. *Logan,* 1940, 315 U. S. 139. In that case the District Court **had the parties to agree upon the amount due which was embodied in an order that unless redemption at that sum was accomplished by a fixed date the mortgage holders might proceed with their sale in foreclosure.** When the farmer debtors failed to pay the redemption price at the time named by the court the case was dismissed. The Circuit Court of Appeals for the Seventh Circuit, when the case was before it in *Wright* v. *Logan,* 1941, 119 Fed. (2d) 354, sustained the District Court, saying:

> "We are in complete accord with the decision of the District Court that he was without right or power to deprive appellees [the mortgage holders], of their rights any longer" . . . Certainly it [Section 75] can not be construed to permit him to allow his proceeding to lie dormant for years, and then, **after expressly promising to surrender possession of the premises involved if he does not pay up within a specified time,** invoke its benefits."

We again digress to compare the *Denney* opinion with that in the *Wright* v. *Logan* case in the Seventh Circuit opinion. It will be noted that the Appellate Court there as here based its affirmance on a promise or consent obtained from the farmer debtors. In this *Denney* case the Seventh Circuit followed practically the same thought in

saying in its opinion at the bottom of R. 94 and the top of R. 95:

> . . . "The court cannot *force* [this is the court's emphasis] the farmer debtor to accept any procedure except that laid down in the statute. That is not to say that the farmer debtor may not come into open court with his attorney and understandingly and voluntarily agree to another procedure. He may deem it to his advantage to accept another procedure. This he is free to do, unless the farmer debtor is to be considered a ward of the court, which view we do not accept. This being so, the appellant may waive a procedure which he may otherwise insist upon."

And at the middle of the opinion at R. 95 it is said:

> "We think the appellant voluntarily, knowingly and advisedly consented to a procedure different from that laid down in the statute, and his conduct in this regard amounted to a waiver of his right to thereafter insist upon the letter of the statute."

Returning now to this Court's opinion in *Wright* v. *Logan* which is being discussed, this Court further said:

> Page 142: **"Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes.** *Cf. Borchard* v. *California Bank,* 310 U. S. 311. We think the *Bartels* [308 U. S. 180], *Wright,* [311 U. S. 273], and *Borchard* [130 U. S. 311] cases control our conclusion here, and that the court below was in error to dismiss the applications for adjudication under Section 75(s)."

The statute, which is the sole guide, does not authorize the sell-out of a farmer debtor because he did not pay into court prior to the end of three years the amount necessary to redeem his property. **Permission by the court to do so,**

or a request by the farmer debtor for permission to do so, does not meet the terms of the statute.

The purpose of the statute to assure **ultimate redemption** was also emphasized in *Adair* v. *Bank,* 1938, 303 U. S. 350, at page 355, where it was held in adjudicating Section 75(s) that:

> . . . "further opportunity for rehabilitation is afforded the debtor, through provisions **enabling him to retain possession** under conditions favorable to its ultimate redemption by him."

In *Bankers* v. *Havel,* 1942, CCA 8, 129 Fed. (2d) 106, that court said in the last paragraph:

> "**That the statute assures to the debtor possession for three years** from the date of the order upon the conditions mentioned in the Act **is no longer open to debate**" citing the decisions of this court in *Borchard* v. *California Bank,* 1940, 310 U. S. 311; *John Hancock* v. *Bartels,* 1939, 308 U. S. 180; and *Wright* v. *Union Central,* 1940, 311 U. S. 273.

To the same effect is the decision of the United States District Court for the Southern District of Iowa in *In re McClenahan,* 1941, 41 Fed. Supp. 694.

In *Rafert* v. *Conway,* 1941, CCA 8, 119 Fed. (2d) 102, the court said:

> "The mortgaged lands were then within the bankruptcy jurisdiction and there was no power to deprive the farmer of them except in strict compliance with the provisions of Section 75 sub. (s) liberally construed to effectuate the legislative intent".

In *Corey* v. *Blake,* a decision of the Ninth Circuit Court, which was anounced May 24, 1943, and published in the

Bankruptcy Law Service on July 9, 1943, it was said, in reversing the District Court and the conciliation commissioner below:

> "Thus, instead of following the orderly procedure which the statute was designed to provide (*John Hancock Mutual Life Ins. Co.* v. *Bartels, supra; Borchard* v. *California Bank, supra*), the commissioner followed a disorderly and unauthorized procedure. *Cf. Borchard* v. *California Bank, supra.* In the course of, and as part of, that disorderly and unauthorized procedure, the commissioner made his order of December 30, 1938, his order of January 4, 1939, and his order of April 18, 1942."

The foregoing demonstrates (1) that the decision of the Circuit Court of Appeals is at variance with the statute—Section 75(s)(3). (2) It is also in conflict with the decision of two other Circuit Courts of Appeals. (3) The question of federal law which is involved has not been, but should be, settled by this court. (4) The decision is in conflict with the applicable decisions of this court which have been cited and others that have not been mentioned. One of the decisions of this court with which the decision below conflicts was a reversal of a Seventh Circuit decision which was, in substance, adhered to in the instant order to which the application for certiorari is directed. *Wright* v. *Logan*, 1940, 315 U. S. 139.

2.

When a petition for review is duly filed with a referee, it is his duty to certify to the judge the question for review. A failure by the officer of the court to do so may not be visited upon the petitioner.

The applicable portions of the Bankruptcy Act are here repeated:

A conciliation commissioner is a referee. Section 75(s)(4): "The conciliation commissioner . . . shall continue to act, and act as referee" . . .

Section 38: "Referees are hereby invested subject always to a review by the judge, with jurisdiction" to exercise certain enumerated powers.

Section 39(a): "Referees shall . . . prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them" . . .

(c): "A person aggrieved by an order of a referee may . . . file with the referee a petition for review of such order by a judge" . . .

That a petition for review was properly filed before the concilation commissioner is indubitably demonstrated by the letter of transmittal from Honorable Samuel E. Cook, counsel for the farmer debtor, to the conciliation commissioner, Honorable Byron G. Jenkins, and the acknowledgment of its receipt in the conciliation commissioner's answer to Mr. Cook in which he said "We have your application for appeal, which will be certified to the District Court in a day or two". R. 41 and 42.

The farmer debtor stated fully the facts concerning the filing of his petition for review with the conciliation commissioner in his application subsequently made directly to the district court which appears at R. 9 to 15. He stated them as follows:

"Your petitioner being aggrieved by said order because that portion thereof relating to rental, because he believed and still believes the same to be void, he instructed his counsel to prepare and file the necessary papers to obtain a review of said order of September 4, 1940, by the Judge of this court.

Said counsel complied with said instructions by

> filing with the conciliation commissioner a petition for review, an assignment of errors and a brief." R. 10, last two paragraphs.

To visit upon the farmer debtor the failure of the conciliation commissioner to comply with the law is the negation of all law. This theory was repudiated by this Court in *Borchard* v. *California Bank,* (1940), 310 U. S. 311, when for four years the court failed to comply with the statutory requirement that a stay order be issued. It was repudiated in *Wright* v. *Logan,* (1941), 315 U. S. 139, where the court kept a proceeding before a conciliation commissioner for several years under Section 75(a) to (r).

For his statements that he had instructed his counsel to file a petition for review and that his counsel had filed it, the judge of the district court characterized the statements of the farmer debtor as "contumacious conduct," R. 30, bottom of page to R. 31, top of page. (This term had been used by this Supreme Court in *Wright* v. *Union Central,* (1940), 311 U. S. 273, 280, as justification for selling out a farmer debtor prior to the end of his three years.) Later, when the conciliation commissioner's letter acknowledging receipt of the petition for review from counsel for the farmer debtor was called to the judge's attention, the judge said:

> "If the review procedure was followed, **it was of course the duty of the Conciliation Commissioner to send the record up for review.** It seems from the supplement to the petition that this matter was handled by correspondence between the attorney for the farmer debtor and the commissioner, a very unsatisfactory way to conduct proceedings of this or any other kind of action in court."

Is it too much to say that the vast majority of proceed-

ings in all federal courts, District, Appellate, and Supreme, are conducted by mail? At any rate, the statutes and the Rules of Civil Procedure so provide.

As this petition and brief are devoted solely to showing that a petition for review should be granted many subjects of discussion on the merits are wholly omitted. However it should probably be said here that the order of September 4, 1940, setting rental for seven years, in addition to being unlawful, was so confused and inconsistent that it was utterly impossible to comply with it for three years of a period of three years and three months from September 4, 1940, into November, 1943. It was constructed upon the erroneous theory that the farmer debtor could lawfully be ordered to pay rent ($2850 if R. 9 be taken, or $2450 with the enigmatic "~~300~~ 100"; "~~350~~ 150"; "~~350~~ 150", if R. 10 be taken) for a period of seven years. It could not be taken piecemeal; it requires complete reconstruction in conformity with the statutory prescription in Section 75(s)(2) that the rental shall be for three years, payable semi-annually. Here was an order (as it stood on September 4, 1940), to pay $2850 if R. 9 be taken (or $2450 or $2450 plus "~~300~~ 100"; "~~350~~ 150"; "~~350~~ 150"; if R. 10 be taken), to cover seven years to be paid in twelve installments of varying amounts of $200 to $215 (or $200 to $200 plus "~~350~~ 150") in periods varying from two months to six months and averaging three and three-elevenths months!

But again it must be noted that the refusal to accord the full three year stay to the farmer debtor was **based entirely upon his failure to redeem prior to three years** and not because he did not obey the order of September 4, 1940. That is, it was based upon the ground that the time for redemption had expired. The District Court order reads:

"The court finds that the time for redemption has expired, and said debtor has failed to so redeem said lands." R. 37, folio 35.

The Appellate Court's opinion reads:

"Since the appellant failed to redeem the property by August 17, 1942, the appellee on September 18, 1942, filed its petition for an order of sale and for the appointment of a trustee therefor" . . .

"On November 21, 1942, after a hearing, the court sustained the petition of the appellee, entered an order for sale, and appointed a trustee." R. 94, middle of page.

And again it is to be noted that no hearing was ever had upon the application of September 18, 1942, as erroneously stated in the words just quoted. See entries from September 18, 1942, to October 7, 1942, inclusive, at R. 65.

The situation as to the order of September 4, 1940, is that although a petition for review was duly filed it was never certified to the judge for review of that order. The petitioner is entitled to that review.

3.

The farmer debtor's constitutional right to due process of law was violated when the order for the sale of his farm was entered without any hearing upon the issues raised by the respondent mortgage holder's application and the farmer debtor's answer to it. R. 15 to 19. R. 20 to 23.

In addition to the assumption that the bankruptcy court may alter the course of procedure prescribed in Section 75(s)(3) as to redemption by arbitrarily setting a date

short of three years at which a farmer debtor must "pay into court" the money to redeem his farm, both the bankruptcy court and the appellate court which sustained its order of sale seem to have further assumed that an application by a mortgage holder for an order to sell the farmer debtor's farm may be granted as a matter of course, *ex parte*, without a hearing.

The mortgage holder (the respondent here) filed a petition for the appointment of a trustee to sell. R. 15. It was filed on September 18, 1942, on the day when the farmer debtor's petition for the three years' stay was heard. See R. 65, entry of September 18, 1942. The farmer debtor filed his answer thereto (R. 20) one week later. R. 65, entry of September 25, 1942. No hearing was held. The court's "Special findings of Fact and Conclusions of Law" (R. 26) were filed on October 7. See R. 65, entry of October 7, 1942.

First, may it be repeated, that the granting of the application for the appointment of a trustee to sell the farm was based **solely upon the failure of the farmer debtor to redeem it before the end of the three years at a date fixed by the court whereby he was permitted to redeem by August 17, 1942.** This order of August 17 is at R. 8. The order to sell the farm is at R. 36. At R. 37, folio 35, the order reads:

> "**The Court finds that the time for redemption has expired, and said debtor has failed to so redeem said lands.** That the petition of The Ft. Recovery Banking Company of Ft. Recovery, Ohio, should be sustained, and an order of sale granted to sell said real estate at public sale, and that a trustee be appointed to sell said land, and the Court being fully advised in the premises:
>
> It Is Hereby Ordered, that Fred B. Dressel of South

Bend, Indiana, be and he is hereby appointed Trustee," . . . etc.

Second, such a drastic order, which deprives the farmer debtor of all right of redemption, contrary to *Wright* v. *Union Central,* 1940, 311 U. S. 273, was entered without that due process of law that all courts require.

In *Morgan* v. *U. S.,* 1938, 304 U. S. 1, this court continued a long history of judicial pronouncements by holding that even in an administrative proceeding which is only quasi-judicial in character, the liberty and property of citizens must be protected by fair and open hearing. In that case there was an open hearing and argument but there was no opportunity given to the person involved to examine the order before it was issued. At page 18, the court said:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

In *Galpin* v. *Page,* 1874, 85 U. S. (18 Wall.) 350, 368, it was said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In *Holden* v. *Hardy,* 1898, 169 U. S. 366, 389, it was said:

> "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union

may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

Volume 6 of Ruling Case Law, in the article on Constitutional Law, Section 442, says of due process of law:

"The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. In fact, one of the most famous and perhaps the most often quoted definitions of due process of law is that of Daniel Webster in his argument in the *Dartmouth College* case, in which he declared that by due process was meant 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' "

Remington on Bankruptcy, in Section 27 relating to Celerity of Proceedings, says:

"While proceedings in bankruptcy may be summary, they should not be so summary as to deprive a party of those fundamental rights that belong to every citizen, among which are the rights to be advised by the demand made upon him and after being so advised, to have a reasonable time to prepare his defense and produce his witnesses."

Likewise in his Chapter on Summary Jurisdiction over the Bankruptcy Remington says in Section 2408:

"Due hearing must be had, and reasonable opportunity therefor is requisite."

In support of the foregoing statements, Remington quotes at length from three opinions: (1) *In re Rosser*, 101 Fed. 106; (2) *Boyd* v. *Glucklich*, 116 Fed. 131; and (3) *In re Frank*, 182 Fed. 794.

1. In re Rosser.

The first case, cited and quoted by Remington, is *In re Rosser,* 101 Fed. 106, which involved an order upon a bankrupt to turn over $2,500 to the trustee. This order was issued after the examination of the bankrupt at the first creditors' meeting of which he had notice. The bankrupt being committed to jail for failure to obey the order, objected that he had not been notified that the turnover order was to be a subject of consideration at the creditor's meeting. In its decision the Circuit Court of Appeals said:

> "Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the question of law which it involved. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void."

2. Boyd v. Glucklich.

The second opinion which Remington quotes is *Boyd* v. *Glucklich,* 116 Fed. 131.

That opinion said:

> "It will be observed that the application of the trustee was not for an order of the bankrupt to show cause, upon reasonable notice, why he should not be required to turn over to the trustee the money and property mentioned in the application, but was for an immediate and unconditional order to be then made, based on the general and desultory examination of the bankrupt which had just been concluded."
>
> . . .
>
> "Dispatch in judicial proceedings is commendable,

but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankrupt Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt."

3. In re Frank.

The third opinion quoted by Remington is that of *In re Frank*, 182 Fed. 794, where the bankrupt was given two days notice of a hearing which resulted in an order upon him. The Circuit Court of Appeals held that the order was void for want of adequate notice.

These three decisions were based upon *Galpin* v. *Page*, 85 U. S. (18 Wall.) 350, which has been quoted at page 46 of this brief.

CONCLUSION.

There is no authority to compel a farmer debtor to redeem his property prior to the end of three years of his statutory stay on the ground that the court, by his consent, has ordered that he be permitted to redeem before that time. When a party's petition for review is duly filed he

is entitled to have it presented to the judge and heard, and the failure of the officer of the court to execute his statutory duty to present the petition for review to the judge may not lawfully be visited on the petitioner. It is unlawful to order a farmer debtor's property sold in such a situation and especially so without hearing of an application by the mortgage holder to have the property sold.

The decisions below are contrary to the statute. They conflict with the decisions of this court, one of which reversed the same circuit. They conflict with the decision of two other circuits. They adjudicate a statutory provision which ought to be, but has not been, construed by this court.

Wherefore the petitioner prays for a writ of certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner
Guy Carleton Denney.

Lima, Ohio
July 7, 1943

(20)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 168

GUY CARLETON DENNEY, *Petitioner,*

vs.

THE FORT RECOVERY BANKING COMPANY, *Respondent.*

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT.

B. A. MYERS,
Attorney-at-Law,
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Cases and Authorities Cited

STATUTES CITED

IN THE

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ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT.

I.

Contested Issues.

After litigation, The Ft. Recovery Banking Company, a secured creditor, and party to the bankruptcy proceedings, withdrew all motions and pleadings to dismiss the

farmer-debtor's amended petition, and by agreement of the parties, the farmer-debtor was adjudged a bankrupt, and the case was referred by the District Judge to the Conciliation Commissioner, Byron G. Jenkins, for further proceedings under the provisions of Section 203, Title 11 of U.S.C.A., as amended, etc. (R. 7, date June 20th, 1940.)

On September 4th, 1940, the Conciliation Commissioner, after a hearing, and after an appraisement of the property, entered an order of rental and stay of proceedings (R. 9).

The Docket of the Conciliation Commissioner shows no petition for review or appeal. (See affidavit of Byron G. Jenkins, filed October 6th, 1942 (R. 25). Also, affidavit of Byron G. Jenkins, filed December 24th, 1942 (R. 54). Byron G. Jenkins is now Circuit Judge of Jay County, Indiana.

Attorneys Samuel E. Cook, and Malcolm V. Skinner, represented the farmer-debtor. After Attorney Cook had mailed to the Conciliation Commissioner a petition for review, Attorney Skinner had a conference with the Conciliation Commissioner and withdrew the petition for review. At the hearing before the District Judge on February 17th, 1942, Attorney Cook was present, and stated to the District Judge that there was no petition for review filed. (See opinion of Judge Slick in case: *In Re: Denney,* 47 Fed. Sup., November 30th, 1942, page 38). Attorney Cook at that time had in his possession all of the correspondence which is referred to in the affidavit of Denney filed November 24th, 1942 (R. 44).

The main issue in this case involved the proceedings and facts above referred to. Respondent claims that they are immaterial and of no force and effect, relying upon

the consent order entered by the District Judge on February 17th, 1942, at a hearing attended by the farmer-debtor, and his attorney, Cook. (See Consent Order, R. 8.) (See also reference thereto pages 13 and 14 of the Record, pleading filed by Elmer McClain, wherein the circumstances of the hearing on February 17th, 1942, are set out.)

Attorney Cook having withdrawn from the case, and Attorney McClain having entered the case, McClain in this cause attempts to have set aside and declared null and of no force or effect the consent order made and entered into by Attorney Cook and the farmer-debtor himself on February 17th, 1942.

The petition of the Respondent, The Ft. Recovery Banking Company, which it had filed on September 18th, 1941, was assigned for hearing on February 17th, 1942. (See Clerk's Docket Entries, R. 64, under date September 18th, 1941.)

On February 17th, 1942, the date of the hearing as assigned, the farmer-debtor, through his attorney, Cook, filed a cross-petition for re-appraisement. The hearing was had on February 17th, 1942, before the District Court and this entry was made on the docket by the Court (R. 64):

> "1942
> Feb. 17 Debtor files cross petition for reappraisement. Hearing on petition to liquidate. By agreement debtor permitted to redeem property for $8680.00 within 6 months from date and waives right to re-appraisement."

The facts are that the farmer-debtor made no effort whatever to comply with this order, but had moved off of

the farm and accepted a position in a defense factory at Indianapolis, Indiana, the farmer-debtor being a graduate engineer.

The six months to redeem having expired on August 17th, 1942, The Ft. Recovery Banking Company, on September 18th, 1942, filed its petition for a trustee and for an order of sale to liquidate the real estate (R. 65).

Upon this issue, and the facts, Respondent claims under the law that it was entitled to an order of sale and the appointment of a trustee.

II.

Issues or Claims of Respondent.

(1)

That there was no petition for review or appeal filed by the farmer-debtor from the order of the Conciliation Commissioner fixing the appraisal and terms of stay.

(2)

That if a petition for review was filed the same was waived by the consent order made and entered in open court before the District Judge on February 17th, 1942.

(3)

That the consent order made and entered on February 17th, 1492 was valid and binding upon the farmer debtor.

(4)

That the issues and questions raised by Counsel for the Petitioner involve disputed facts and that the special finding of facts made by the District Judge are not subject to review under the facts and circumstances presented, there was substantial evidence to support the District Judge in his findings.

III.

Statement of the Case and Subject Matter.

The issues involved in this cause were originally tried before the Hon. Thomas W. Slick, Judge of the United States, for the Northern District of Indiana, Ft. Wayne Division. The questions presented arise out of the redemption provisions of the Farmer-Debtor law, Section 75 of the Bankruptcy Act, 11 U.S.C.A. 203.

The particular statute involved is Section 75(s) (3).

The District Court made special findings of fact in rendering his decision, which were filed and are a part of the record (R. 26).

These findings of fact were not attacked by Counsel for either party and stand as the facts in this case.

"SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Court having read the verified application for stay filed by the farmer-debtor, and considered the other verified and unverified pleadings in the matter, now finds and states as special findings of fact as follows, to-wit:

I.

Petitioner, Guy Carleton Denney is a farmer-debtor and the Fort Recovery Banking Company of Fort Recovery, Ohio, is a secured creditor. Proceedings were had under Section 75 of the Bankruptcy Act that finally resulted, on September 4, 1940, in the Conciliation Commissioner making an order pursuant to the orders of this Court, which order provided for a stay of proceedings in the State Court, fixing certain rentals to be paid by the farmer-debtor, part of which antedated the issuance and entry of the order of this Court to the Conciliation Commissioner.

II.

The order of the Conciliation Commissioner requiring the farmer-debtor to pay as rentals for the farm of which the Farmer-Debtor retained possession for the year 1941 and 1942 the sum of $420.00 per annum; that no receiver should be appointed; and that all rentals of said land were to be paid to the Commissioner; that all proceedings in the State Courts were to be stayed during the period of redemption as fixed by the Bankruptcy Act and that the debtor should remain in possession of the land during said period of redemption under the supervision of the Court.

III.

The farmer-debtor felt aggrieved with the decision of the Conciliation Commissioner and instructed his counsel to prepare and file the necessary papers to obtain a review of said order, said order being made on September 4, 1940.

IV.

The instructions of the farmer-debtor to his counsel to obtain a review of said order were not followed. However, his counsel did prepare a petition for a review and an assignment of errors and mailed the same to the farmer-debtor who failed and neglected to file the same with the Conciliation Commissioner.

V.

Afterwards, to-wit, on June 17, 1942, the Court pursuant to the consent of the farmer-debtor, made in open court, entered the following order, to-wit:

> 'At South Bend, Indiana, in said District on the 17th day of February, 1942, this cause having been duly assigned for hearing on the petition of The Ft. Recovery Banking Company of Ft. Recovery, Ohio, to liquidate the real estate of the bankrupt, described in his petition herein, and on the cross-petition of the debtor or bankrupt for re-appraisement, notice having been given, and said bankrupt having appeared in person and

by his attorney, and The Ft. Recovery Banking Company of Ft. Recovery, Ohio, having appeared personally through its officers and agents, and its attorney, said parties in open court agreed as follows:

That said bankrupt waive his right of re-appraisement, and that said debtor or bankrupt be permitted to redeem said property as described in his petition for eight thousand six hundred and eighty dollars ($8680.00), to be paid into Court on or before August 17, 1942. On default thereof, said land to be sold.

Both parties interested having agreed in open Court as above set out, the Court approves and confirms said agreement, the same to be made a part of the record of this proceedings. Both parties waive all right of proceedings in appeal or error.

Dated June 17, 1942.

Approved: Thos. W. Slick, Judge of the United States for the Northern District of Indiana, Fort Wayne Division.

O.K. Attorney for Bankrupt,
O.K. B. A. Myers,
Attorney for the Ft. Recovery Banking Co., Ft. Recovery, Ohio.'

VI.

At no time since the beginning of these proceedings has the farmer-debtor paid any rent or interest or anything on the principal of the debt of the Ft. Recovery Banking Company.

Thos. W. Slick
Judge, U. S. District Court."

Special finding of fact marked III was later supplemented by the District Court upon the receipt of additional information showing that no appeal was filed from the

order of the Referee fixing the rentals. (Affidavit of Byron G. Jenkins, Referee, R. page 54. Also, Supplemental Opinion of the District Court, R. page 55):

"SUPPLEMENTAL OPINION

Since filing the opinion overruling the Farmer-Debtor's Supplemental Petition for Re-hearing, the affidavit of Honorable Byron G. Jenkins, former Conciliation Commissioner, has been called to my attention.

The affidavit shows clearly what happened. Malcolm V. Skinner, one of the attorneys for the Farmer-Debtor, withdrew the petition for appeal mailed to the Conciliation Commissioner by his co-counsel, Hon. Samuel E. Cook. This showing entirely exonerates former Conciliation Commissioner Jenkins and explains why the appeal was not followed up, and serves to emphasize what I said in the original opinion overruling the supplemental petition for re-hearing concerning the very unsatisfactory way these proceedings were conducted and only fortifies me in my former opinion overruling the supplemental petition for re-hearing.

It now appears that no appeal was taken and that the order of the Conciliation Commissioner stands unappealed from.

Thos. W. Slick (Signed)
Judge, U. S. District Court

Dated: December 26, 1942.
Hammond, Indiana."

An order was made on September 4th, 1940, fixing the rentals to be paid by the Farmer-Debtor, which order was made by the Referee. (Copy of order, See R. 9 and 10.)

The Farmer-Debtor paid no rental and made no effort to comply with the order of the Referee, and on September 18th, 1941, The Ft. Recovery Banking Company, Respond-

ent, filed a petition for the sale of the real estate and the appointment of a trustee. (See Clerk's Docket Entries, R. 64.) This petition was assigned for hearing by the District Court on February 17th, 1942, and an agreement or consent order was made by the Farmer-Debtor and his Attorney, with the Respondent and its Attorney. (See Clerk's Docket Entries, R. 64.) This entry was put in writing and approved by the Court on June 17th, 1942. (Clerk's Docket Entries, R. 64.)

The entry was as follows:

"And Afterwards, to wit: On the 17th day of June, 1942, the Court entered an order in the above entitled cause, and said order reads in the words and figures following, to wit:

At South Bend, Indiana, in said District, on the 17th day of February, 1942, this cause having been duly assigned for hearing on the petition of the Ft. Recovery Banking Company of Ft. Recovery, Ohio, to liquidate the real estate of the Bankrupt, described in his petition herein, and on the cross-petition of the debtor or Bankrupt for re-appraisement, notice having been given, and said Bankrupt having appeared in person and by his Attorney, and The Ft. Recovery Banking Company, of Ft. Recovery, Ohio, having appeared personally through its officers and agents, and its attorney, said parties in open Court agreed as follows:

That said Bankrupt waive his right of re-appraisement, and that said debtor or Bankrupt be permitted to redeem said property as described in his petition for eight thousand, six hundred and eighty dollars ($8680.00), to be paid into Court on or before August 17th, 1942. On default thereof, said land to be sold.

Both parties interested having agreed in open Court as above set out, the Court approves and confirms said

agreement, the same to be made a part of the record of this proceedings. Both parties waive all right of proceedings in appeal or error.

Dated June 17th, 1942.

Approved: Thos. W. Slick,
Judge, District Court of the United States for the Northern District of Indiana, Ft. Wayne Division.

O.K.....
Attorney for Bankrupt

O.K. B. A. Meyers (signed)
Attorney for the Ft. Recovery Banking Company, Ft. Recovery, Ohio."

And, afterwards, to wit, on the 11th day of August, 1942, Attorneys Malcolm Skinner and Samuel E. Cook, apparently withdrew from the case and Attorney McClain, on behalf of the debtor, filed an application for a three year stay, and for opportunity to redeem.

Afterwards, to wit, on the 18th day of September, 1942, more than ninety (90) days after the filing of the entry on June 17th, 1942, the Respondent filed an application for the appointment of a Trustee and for an order of sale of the real estate of the Farmer-Debtor (R. 15). This application was filed because the Farmer-Debtor had wholly failed to comply with the consent order entered on February 17th, 1942, in open Court and before the District Judge, and because neither one of these orders had been appealed from.

These matters were submitted to the District Court, the Farmer-Debtor being present in person and by his Attorney, McClain, and Respondent being present by its officers and its Attorney, B. A. Myers, and afterwards,

to-wit, on the 7th day of October, 1942, the District Court entered its special findings of fact and conclusion of law and opinion. (R. pages 26, 27, 28, 29, 30, 31 and 32).

Afterwards, to wit, on the 21st day of November, 1942, the District Court entered an order appointing Fred B. Dressel, Trustee to sell said real estate (R. 36).

Afterwards, to wit, on the 17th day of December, 1942, the Farmer-Debtor filed his Notice of Appeal (R. 47.)

The Circuit Court of Appeals, Seventh Circuit, heard this case and decided it, affirming the District Court, on April 19th, 1943. Reported in 135 (2d) Federal Reporter, 184.

IV.

Law Laid Down by Circuit Court of Appeals.

The Circuit Court in its decision defined the law as follows:

"1. Courts

An appeal does not lie from order denying a petition for rehearing and a supplement thereto.

2. Bankruptcy

A farmer-debtor is free to accept any procedure other than that laid down in the Banruptcy Act, and thus waive a procedure which he may otherwise insist upon. Bankr. Act, Sec. 75, subs. a-s, 11 U.S.C.A. Sec. 203, subs. a-s.

3. Bankruptcy

Where farmer-debtor in open court personally and by counsel agreed to order providing that he should have right to redeem land at its agreed value on or before a certain date, in default of which land was to be sold, he thereby "waived" his right to redeem with-

in three-year statutory period of redemption. Bankr. Act, Sec. 75, sub. s, 11 U.S.C.A. Sec. 203, sub. s.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Bankruptcy

Farmer-debtor who accepted part of order setting aside exemption could not insist upon consideration of his petition to review the whole order which sought to fix the value of the realty. Bankr. Act, Sec. 75, sub. s, 11 U.S.C.A. Sec. 203, sub. s.

5. Appeal and error

One cannot appeal from an order or judgment under which he has accepted a benefit.

6. Bankruptcy

An order requiring farmer-debtor to pay rent which remained unreviewed and unchallenged could not be impeached when creditor sought an order for sale of the land and appointment of a trustee therefor. Bankr. Act, Sec. 75, subs. a-s, 11 U.S.C.A. Sec. 203, subs. a-s.

7. Bankruptcy.

Where farmer-debtor for more than two years failed and refused to comply with court's order to pay rent, court was justified in ordering a sale of the land and appointing a trustee therefor. Bankr. Act, Sec. 75, subs. a-s, 11 U.S.C.A. Sec. 203, subs. a-s."

As attorney for the Respondent, we have attempted to make reference to the facts of this case as determined by the District Judge. We have also made reference to the findings of the law by the Circuit Court of Appeals.

We have done this because Attorney for the Farmer-Debtor in the Record and in his brief, attempts to cloud the real facts and issues, of the case, and attempts, as we believe, to substitute his facts and conclusions, disputing the real issues presented to the District Court and the Circuit Court of Appeals.

V.

ARGUMENT AND LAW.

Counsel for respondent, after studying this case, has concluded that the opinion of Minton, Circuit Judge of the Court of Appeals, fully covers all the essential facts and legal questions involved in this case, and respectfully submit the same to this Court as for argument and law, quoting:

"MINTON, Circuit Judge.

The appellant on March 31, 1937 filed a petition for a composition with his creditors or for an extension of his debts under Section 75, subs. a to r of the Bankruptcy Act, 11 U.S.C.A. Section 203, subs. a to r. The proceeding failed, and the appellant on June 5, 1937 filed an amended petition under Section 75, sub. s of the Bankruptcy Act, 11 U.S.C.A. Section 203, sub. s, praying to be adjudged a bankrupt. By an agreed order made on June 20, 1940, the petitioner was adjudicated a bankrupt. The case was referred to a conciliation commissioner, and the court ordered that the property be appraised and that the commissioner require the bankrupt to pay rent, as required by statute. The appraisal of the property was filed July 6, 1940, appraising it at $7,000. Thereafter, on September 4, 1940, after a hearing, the commissioner fixed a schedule of rents to be paid by the appellant ordered that his exemption be set off to him, and ordered a stay of other proceedings.

The appellant was represented by Malcolm V. Skinner of Portland, Indiana, and Samuel E. Cook of Huntington, Indiana. Mr. Cook prepared and mailed to the commissioner a petition to review the rent order made by the commissioner. His associate, Mr. Skinner, withdrew the petition, and it was never considered by the court. Therefore, the order of September 4, 1940 stood.

The appellant paid no rent, interest or taxes, nor did he make any payments on the principal. He remained in possession, and was in possession on February 17, 1942. The appellee held a mortgage on the appellant's farm and had filed a petition to liquidate the real estate. This petition came on for hearing on February 17, 1942. The appellant was present in person, and by his counsel, Mr. Cook. The appellee was present by its officers and by its attorney. The parties then and there agreed in open court to the following order, which was filed of record June 17, 1942, to-wit:

'At South Bend, Indiana, in said District, on the 17th day of February, 1942, this cause having been duly assigned for hearing on the petition of The Ft. ecovery Banking Company of Ft. Recovery, Ohio, to liquidate the real estate of the Bankrupt, described in his petition herein, and on the cross-petition of the debtor or Bankrupt for re-appraisement, notice having been given, and said Bankrupt having appeared in person and by his Attorney, and The Ft. Recovery Banking Company, of Ft. Recovery, Ohio, having appeared personally through its officers and agents, and its attorney, said parties in open Court agreed as follows:

'That said Bankrupt waive his right of re-appraisement, and that said debtor or Bankrupt be permitted to redeem said property as described in his petition for eight thousand, six hundred and eighty dollars ($8680.00), to be paid into Court on or before August 17th, 1942. On default hereof, said land to be sold.

'Both parties interested having agreed in open Court as above set out, the Court approves and confirms said agreement, the same to be made a part of the record of this proceedings. Both parties waive all right of proceedings in appeal or error.'

The appellant still continued in possession of the real estate. Just how long he remained in possession does not appear, although it does appear that the appellant left the real estate and moved to Indian-

apolis. He was by profession an engineer, and he accepted a position as an engineer in a defense plant in that city. The real estate, however, remained in his possession through his tenants.

Since the appellant failed to redeem the property by August 17, 1942, the appellee on September 18, 1942, filed its petition for an order of sale and for the appointment of a trustee therefor. No payment of rent, interest, taxes, or any part of the principal had been made by the appellant.

On November 21, 1942, after a hearing, the court sustained the petition of the appellee, entered an order of sale, and appointed a trustee. The appellant filed a petition and supplement to the petition for rehearing, both of which were overruled. The appellant appeals from the order of the court of November 21, 1942, and the order denying the petition and supplement to the petition for rehearing.

(1) Obviously, an appeal does not lie from the petition for rehearing and the supplement thereto. *Buffington* v. *Harvey,* 95 U. S. 99, 24 L. Ed. 381; *Roemer* v. *Bernheim,* 132 U. S. 103, 10 S. Ct. 12, 33 L. Ed. 277; *First Trust & Savings Bank* v. *Iowa-Wisconsin Bridge Co.,* 8 Cir., 98 F. 2d 416.

The appellant contends it was error for the court to order the sale of the property pursuant to the consent decree entered June 17, 1942, as the statutory three-year period for redemption had not expired, that the procedure laid down in the statute must be followed and the appellant could not waive this procedure.

(2) With this contention we are unable to agree. The statute has prescribed a certain procedure that must be followed if the farmer-debtor insists upon it. It is not for the courts to point out or explore any short cuts. The court cannot *force* the farmer-debtor to accept any procedure except that laid down in the statute. That is not to say that the farmer-debtor may not come into open court with his attorney and

understandingly and voluntarily agree to another procedure. He may deem it to his advantage to accept another procedure. This he is free to do, unless the farmer-debtor is to be considered a ward of the court, which view we do not accept. This being so, the appellant may waive a procedure which he may otherwise insist upon.

The appellant relies upon *John Hancock Mut. Life Ins. Co.* v. *Bartels,* 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176, and *Borchard* v. *California Bank,* 310 U. S. 311, 60 S. Ct. 957, 84 L. Ed. 1222. In both of these cases, there was an effort to compel the farmer-debtor to accept a procedure other than that provided by statute. In neither case did he consent in open court under the advice of counsel to an order, as the appellant did in the case at bar on February 17, 1942. In the *Borchard* case, *supra,* there was some stipulations and consent orders made as the proceedings went along, dealing with the disposition and use to be made of funds, derived from the crops, but the final step that led to the court's order for liquidation of the property was not consented to by the farmer-debtor, and the stipulations were no part of that proceeding.

(3) We think the appellant voluntarily, knowingly and advisedly consented to a procedure different from that laid down in the statute, and his conduct in this regard amounted to a waiver of his right to thereafter insist upon the letter of the statute.

(4, 5) The appellant insists that his petition mailed to the commissioner to review the order of September 4, 1940 fixing the rent to be paid, setting off to him his exemption, and staying any other proceedings, must be certified to the judge for decision. If the appellant had not by his attorney withdrawn the petition, and the District Court found from evidence in the record that he had, there might be some merit in this contention. The appellant did another thing with reference to the order he would review. He sought to review the whole order of September 4, 1940, and his

counsel admitted that the bankrupt had received, accepted and kept the exemption that was set off to him under one of the provisions of that order. He cannot accept part of the order and insist upon consideration of his petition to review the whole order. One cannot appeal from an order or judgment under which he has accepted a benefit. *Chase* v. *Driver,* 8 Cir., 92 F. 780; *Albright* v. *Oyster,* 8 Cir., 60 F. 644; *Kaiser* v. *Standard Oil Co.,* 5 Cir., 89 F. 2d 58; *Sterne* v. *Vert,* 108 Ind. 232, 9 N. E. 127.

(6) Since the order of September 4, 1940 remained unreviewed and unchallenged, there was an order by the commissioner that the appellant pay rent, which order provided the amount to be paid and when it was to be paid. Since this order was not reviewed, its validity cannot now be impeached. From September 4, 1940, when this order was entered, to this day, the appellant has not obeyed the order of the court to pay rent. The statute, section 75, sub. s (3) of the Bankruptcy Act, 11 U.S.C.A., Section 203, sub. s (3), provides:

> 'If, however, the debtor at any time fails to comply * * * with any orders of the court made pursuant to this section * * * the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.'

(7) Because the appellant for more than two years after the order to pay rent was made, failed and refused to comply with the court's order that he pay rent, the court was justified under the provisions of the statute just quoted in ordering a sale of the land and the appointment of a trustee therefor."

This is a direct quotation of Judge Minton's decision, 135 Federal Reporter, 2d Series, 184.

VI.

CONCLUSION.

As the U. S. Circuit Court of Appeals, in its opinion above has carefully analyzed the U. S. Supreme Court decisions cited by Counsel for Petitioner, definitely showing that they have no application to the issues involved in this case, we feel that it is unnecessary for us to make further comment, as the Court is familiar with those cases.

Respectfully submitted,

B. A. MYERS,
Counsel for the Respondent, The Ft. Recovery Banking Company.

(21)

IN THE

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REPLY BRIEF.

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REPLY BRIEF.

The order of this reply brief follows that of the brief of the respondent to which it replies. All emphasis is supplied.

Page 2 of "Brief of Respondent"
The Last Whole Paragraph

The statement that "Attorney Skinner had a conference with the Conciliation Commissioner and withdrew the petition for review" is one injected into the case after it had been asserted that no petition for review had ever been filed, with the further castigation of the petitioner as "contumacious" for asserting that it had been filed. R. 29, bottom of page to R. 31 top of page. When, upon the discovery of the original letter from the conciliation commissioner (quoted at R. 42, last paragraph of the quoted letter of September 17, 1940), it was indubitably proved that **the petition for review had been filed exactly as the petitioner asserted,** the statement was made that to file such a paper "by correspondence" was "a very unsatisfactory way to conduct proceedings". R. 45, bottom of page, R. 46, top of page.

Later, after the final order of the district court had been entered and **after the appeal to the court of appeals had been taken** the respondent put in an affidavit that the petition for review had been withdrawn (R. 54) by an Attorney Skinner **who is now deceased.** R. 60. The assertion is as empty as would be one that an appeal as a matter of right fully perfected in a United States Circuit Court of Appeals was stricken from the docket of that court because the papers were delivered by the clerk to someone, or even that someone had suggested to the clerk that he pay no attention to them.

Page 3 of "Brief of Respondent"
First full paragraph

The "consent order" of February 17, 1942, as the respondent represents it, was **not** consented to by either At-

torney Cook or by the petitioner No "consent order" was entered on February 17, no order whatever was made or entered on that date It was four months later that an order was entered on August 17. R. 8. The only evidence of "consent" is that noted by the clerk at R. 64, entry of December 17, 1942, which reads: "By agreement **debtor permitted to redeem** property for $8680.00 within six months from date and waives right to reappraisal." The order which was put on **four months later** at R. 8 was never approved by the petitioner or his counsel, as there fully appears. The words "On default thereof, said land to be sold," were **not part of any "consent"**, the only "consent" was that the debtor be "permitted to redeem."

Pages 3 and 4 of "Brief of Respondent
Paragraph beginning at bottom of page 3
and ending at top of page 4

The statement that the petitioner "moved off the farm and accepted a position in a defense factory" etc., is gratuitous and unsupported by any evidence.

Page 4 of "Brief of Respondent"
Paragraph (4) at bottom of page.

If the words "disputed facts" which are here used by Respondent, are meant to refer to the repeated statement that "no petition for review was ever filed" it must be said that the respondent itself put into the record on affidavit of the former conciliation commissioner stating that it had been filed exactly as the petitioner originally asserted. R. 54. Also that the respondent put into the record the statement of the district judge himself that the petition for review had been filed exactly as the petitioner originally asserted. R. 55, folio 58. Appellee's (respondent's) designation at R. 56, bottom of page.

Pages 5 to 8 of "Brief of Respondent"

The respondent originally asserted that a petition for review was **never filed.** It then asserted by its own documents that it **was filed.** It then countered with the **post-mortuary statement** that it was filed by Attorney Cook and later handed by the conciliation commissioner to an Attorney Skinner, **who is now deceased.**

The short of the whole subject of the petition for review is that it was **duly filed but never certified by the conciliation commissioner to the court** pursuant to his statutory duty that referees shall "prepare promptly and transmit to the clerks certificates on petitions for review." Bankruptcy Act, Section 39 a (8). This the respondent admits.

Page 8 of "Brief of Respondent"
Bottom of page

It was impossible to comply with the void and enigmatic order of the conciliation commissioner.

Finally the petitioner respectfully points out that the respondent diligently beclouds the issue of whether a bankruptcy court may shorten the statutory stay of three years and then sell out the farmer debtor because he fails to **"pay into court"** the value of his farm before the shortened period. In other words the issue is whether the bankruptcy court may by judicial legislation amend Section 75 (s) (3) **as if it read:** "At the end of three years, or prior thereto, **or within such shorter time as the court may fix,** the debtor may pay into court", etc.

The **only basis** of the order appealed from is in the statement of the district court that:

> "The court finds that **the time for redemption has expired,** and said debtor has failed to so redeem said lands". R. 37, folio 35.

The appellate court based its affirmance upon exactly the same ground:

> "**Since the appellant failed to redeem the property** by August 17, 1942, the appellee on September 18, 1942, filed its petition for an order of sale and for the appointment of a trustee therefor" . . .
>
> "On November 21, 1942, after a hearing, the court sustained the petition of the appellee, entered an order for sale, and appointed a trustee." R. 94, middle of page.

It is also respectfully repeated that **no hearing was ever held on the petition of the respondent for an order of sale.** The words "**after a hearing,** the court sustained the petition of the appellee, entered an order for sale, and appointed a trustee" are true only in the sense that "after a hearing **on a different matter,** the court sustained the petition of the appellee" etc. Nothing was heard by the district court but the petition of the petitioner that (1) he be allowed his full three year stay pursuant to Section 75 (s) (2) and (2) that his petition for review be heard pursuant to Section 39 a and c.

Respectfully submitted,

ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner,
Guy Carleton Denney.

Lima, Ohio
September 17, 1943

(22)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 168

GUY CARLETON DENNEY, *Petitioner,*

vs.

THE FORT RECOVERY BANKING COMPANY,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING.

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Cases Cited.

STATUTES CITED

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ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court of the United States:

The petitioner respectfully presents his petition for rehearing:

NOTE: All emphasis within quotations in this petition is supplied.

I.

The petition for certiorari was denied on October 11, 1943. The petitioner does not know, and does not know how to find out, the reason why it was denied. Without such knowledge he presents his reasons why he prays that the denial be reconsidered and his petition granted.

II.

There Is But One Simple Issue and it is this:

If a farmer debtor requests the court to consent that he may redeem his farm under Section 75(s) before the expiration of the three-year period fixed by statute, and he fails to do so, may the court for such failure order it sold before the expiration of the three years? That is the only issue. We submit the lower court has no such authority. It violates not only the spirit but the letter of the statute. Its action amounts to judicial legislation—to judicial nullification of an act of Congress.

All other matters which have been discussed have been lugged into the case to hide the real issue.

The statute reads:

> "At the end of three years, or prior thereto, **the debtor may pay into court** the amount of the appraisal . . . " etc.

whereupon his farm is to be cleared of all liens. Section 75(s)(3).

This is a remedial statute. It must be liberally construed to preserve the farm and the home. As this Supreme Court has so aptly said in the Adair case "These provisions

look toward the maintenace of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy." To permit the decision of the lower court to stand is not only to permit it to be strictly construed but **to be misconstrued** so as to deprive the farmer of his home and **defeat the purpose of the Act.** It does not say anything about an **attempt** to pay, or a **promise** to pay.

This farmer debtor found that he was unable to raise the redemption money as he expected and before the date set by the court he notified the court of his inability and asked for the full three years.

The court then ordered him sold out for the sole reason that he did not redeem at the premature date.

That was the only ground for the order of sale and both the bankruptcy court and the Appellate Court expressly so declared. We quote from both courts. The finding of the bankruptcy court in its final order reads: "**The court finds that the time for redemption has expired, and said debtor has failed to so redeem said lands.**" R. 37, folio 35. **This is the only ground for the order.**

The appellate court in its opinion said: "**Since the appellant failed to redeem the property** by August 17, 1942, the appellee on September 18, 1942, filed its petition for an order of sale and for the appointment of a trustee therefor." R. 94, second full paragraph.

All other matters that have been brought into the record by (1) the respondent; (2) by the district court; and (3) by the appellate court serve only to confuse the issue. **That issue, we repeat, is merely whether under the statute mere consent to redeem without payment into court short-**

ens the period for redemption fixed by the statute. It can be so shortened only by amending the statute.

III.

The history of the farmer debtor law, Section 75 of the Bankruptcy Act, 11 U. S. C. 203, records a total failure and refusal of the federal courts in some sections of this country to execute the statute of the United States as expounded by this court. It is a sorry story, which is not applicable to any other law, of the persistency and enmity with which the defeat of this law has been pursued.

There is no exaggeration at all in stating that the statute is, by some, hated and mocked and every device that can be conceived of is employed to prevent its purpose being achieved. In some sections, the courts lend a hospitable ear to the creditor and turn a hostile ear to the farmer debtor. Equity and the purpose of the statute are given no consideration. **The harsh principles of forfeiture are employed.**

Counsel for the petitioner are well aware that denial of certiorari in a particular case is not to be construed as sustaining and approving the order which is involved. **But neither is it a disapproval or a reversal.** The order stands as a precedent to be eagerly cited as "certiorari denied" and followed. Denial of certiorari in a single case gives to the lower courts that have shown very little inclination to follow the equitable spirit of the law an excuse for annihilating, emasculating and destroying the statute and breaking down the salutory effects of the decisions of this court.

IV.

The opinions of the Seventh Circuit are replete with remarks and actions which are inconsistent with that "liberal construction" many times declared by this court to be required in administering Section 75 so as to accomplish its purpose.

> "Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. *John Hancock Mutual Life Ins. Co.* v. *Bartels*, [308 U. S. 180] at pages 186-187; *Borchard* v. *California Bank*, [310 U. S. 311], at page 317. There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. **Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (John Hancock Mutual Life Ins. Co. v. Bartels, [308 U. S. 380]; Kalb v. Feuerstein, [308 U. S. 433]) lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.**"

Wright v. *Union Central*, 1940, 311 U. S. 273, 279 and 280. Followed and quoted in *Wright* v. *Logan*, 1942, 315 U. S. 139, 141 and 142. See also *Mangus* v. *Miller*, 1942, 317 U. S. 178, last paragraph on p. 181. Applied to this Denney case these declarations by this court mean that the farmer debtor is entitled to have his full measure of relief, that is he is entitled to a three-year stay.

The farmer debtor under Section 75 has always had hard sledding in the Seventh Circuit. A few examples follow:

1. The farmer's difficulty in that circuit has not arisen out of any antipathy to the principle of the national debtor legislation, but rather due to bias against farmer debtor legislation, the Seventh Circuit Court, unconsciously, we believe, has assumed to repeal acts of Congress by judicial annulment. In the year 1935 the Seventh Circuit threaded a veritable maze of factual and legal difficulties to uphold the extension of the right of redemption against foreclosure given to corporations by Section 77B, while at the same time it held a similar extension of the right of redemption against foreclosure given to farmers by Section 75 to be unconstitutional. See *Cook County* v. *Straus*, also cited as *In re Argyle-Lake Shore Bldg. Corporation*, CCA 7, 1935, 78 Fed. (2d) 491, and *Lafayette Life Ins. Co.* v. *Lowmon*, also cited as *In re Lowmon*, CCA 7 1935, 79 Fed. (2d) 887.

2. Although this court in *Wright* v. *Vinton*, 1937, 300 U. S. 440, at 454, expressly cited the case, which has just been referred to, that is *Lafayette* v. *Lowman*, CCA 7 1935, 79 Fed. (2d) 887, as one of the decisions holding the extension of the right of redemption for farmers in Section 75 to be invalid, and overruled it, the Seventh Circuit refused to acknowledge it. On the contrary in *In re Wright*, CCA 7 1937, 91 Fed. (2d) 894, it said: "We do not understand that the question in the *Lowmon* case was before the Supreme Court in the *Wright* case." This court reversed that decision also in *Wright* v. *Union Central*, 1938, 304 U. S. 502. Later, in *In re Monjon*, also cited as *Monjon* v. *Equitable Life*, CCA 7 1940, 113 Fed. (2) 535, the Seventh Circuit stated that it had "learned from subsequent rulings of the Supreme Court in *Wright* v. *Vinton*, 300 U. S. 440 and *Wright* v. *Union Central*, 304 U. S. 502, and other cases that the holding in the *Lowmon* case was erroneous." But of course Lowmon lost her farm!

3. In *Wright* v. *Union Central*, CCA 7 1939, 108 Fed. (2d) 361, when deciding a case under the last sentence of Section 75(s)(3) providing that "the court **may**" liquidate a farmer debtor's estate under certain conditions (defined by this court in *Wright* v. *Union Central*, 1940, 311 U. S. 273, at page 281, as "certain contumaceous conduct") the Seventh Circuit held that non-payment of rent "not only authorized the entry" of an order of liquidation but **"made such action imperative"** citing *Wright* v. *Vinton*, 300 U. S. 440, which bears no such construction. This court reversed that decision also in *Wright* v. *Union Central*, 1940, 311 U. S. 273.

4. In *In re Leinweber*, also cited as *Leinweber* v. *Federal Land Bank*, CCA 7 1938, 95 Fed. (2) 240, the Seventh Circuit held that the statutory provision in Section 75 (s)(5) that a dismissed farmer debtor proceeding **"shall be promptly reinstated"** means that **"the farmer debtor shall promptly apply to the court for reinstatement"** and decided the case wholly upon the farmer debtor's failure to promptly make application for reinstatement. Other circuits hold, and this court has also held, that the rights accruing to farmer debtors do not depend upon diligence by the debtor. See *Cohan* v. *Elder*, CCA 9 1940, 112 Fed. (2) 967 and *Wright* v. *Logan*, 1942, 315 U. S. 139, 141.

5. In *In re Lowman*, also cited as *Lowman* v. *Federal Land Bank*, CCA 7 1939, 107 Fed. (2) 540, the farmer debtor was able to pay into court the appraised value of his farm but no more. The appellate court put the issue very clearly in the words:

> "The debtor-appellant contends that he has an absolute right during, or at the close of the moratorium period, to purchase the property at its appraised value, and that no other disposition of the property may be

made which would interfere with his right to purchase."

The Seventh Circuit denied this contention. It held that the creditor's right to a public sale at which he could bid his mortgage claim, and thus fix the redemption value at the amount of the mortgage and put it beyond the reach of the farmer debtor, defeated the right of redemption.

This court denied certiorari at 309 U. S. 680; denied a petition for rehearing at 310 U. S. 656; and denied a second petition for rehearing at 311 U. S. 724. Certiorari was later granted on the same question from the same Seventh Circuit in *Wright* v. *Union Central*, 1940, 311 U. S. 273, and the lower court was reversed, thus sustaining the original contention of the petitioning farmer debtor Lowman. But of course, in the meantime, Lowman irretrievably lost his farm by the unlawful orders on which certiorari was denied.

6. In *In re Moon*, also cited as *Moon* v. *Union Central*, CCA 7 1939, 107 Fed. (2d) 545, the Seventh Circuit made the farmer debtor's right to redeem at the value of his farm to be conditioned upon approval by the mortgage holder, that is, it gave a power of veto to the secured creditor! This court again denied certiorari at 310 U. S. 624; denied rehearing at 310 U. S. 658; and denied leave to file a second petition for rehearing, also at 310 U. S. 658.

As in the *Lowman* case although certiorari was later granted on the same question in *Wright* v. *Union Central*, 1940, 311 U. S. 273, of course Mr. Moon's farm by that time was lost to him!

7. In *In re Wilson*, also cited as *Wilson* v. *Louisville Joint Stock Land Bank*, CCA 7 1939, 105 Fed. (2d) 302,

the Seventh Circuit refused to recognize payment of the $100 balance of a rental instalment tendered after an order of dismissal although the farmer debtor had before dismissal tendered the check from which the $100 was realized. It seized upon the unfortunate Note 6 in *Wright* v. *Vinton,* 300 U. S. 440, 462, (later repudiated in *John Hancock* v. *Bartels,* 308 U. S. 180, 184), as its authority for upholding dismissal. The *Wilson* decision of the Seventh Circuit was overruled when this court reversed it again in *Wright* v. *Union Central,* 1940, 311 U. S. 273, for denying a farmer debtor the right to redeem for non-payment of rental. But again the farmer lost his farm by an unlawful dismissal!

8. In *In re Monjon,* also cited as *Monjon* v. *Equitable Life,* CCA 7 1940, 113 Fed. (2d) 534, the Seventh Circuit was impelled to follow the 1940 Borchard decision of this court in 310 U. S. 311, and declare an order of sale invalid because the prescribed statutory procedure had not been observed by the court, but, it espoused an "equivalent" theory, later repudiated in *Wright* v. *Logan,* 1942, 311 U. S. 139, another Seventh Circuit case, and **refused to give her a three-year stay, saying:**

> "We merely hold that she is entitled to an opportunity to pay the appraised value of her property into court, or, if the appellee demands it, a public sale" . . .

Again giving the creditor a power of veto!

9. In the farmer debtor case of *In re Pramer,* also cited as *Pramer* v. *Sharon Bank,* CCA 7 1942, 131 Fed. (2d) 733, the Seventh Circuit said: "Our experience in proceedings of this kind makes us skeptical as to when, if ever, the terminal is reached."

10. In this case, *Denney* v. *Fort Recovery Bank*, CCA 7 1943, 135 Fed. (2d) 184, the Seventh Circuit said:

> "We think the appellant voluntarily, knowingly, and advisedly consented to a procedure different from that laid down in the statute, and his conduct in this regard amounted to a waiver of his right to thereafter insist upon the letter of the statute."

That is, because the farmer debtor asked the bankruptcy court to consent to redemption before the three years was up and he was unable to make good because he could not raise the money, he can not have his full three years! We state again that **the farmer debtor Denney never agreed that in default of redemption at the premature date, the land was to be sold. That provision was grafted into an order approved by the respondent but not by the petitioner.** We cannot believe that the Supreme Court agrees with the district and circuit courts below that, because a farmer in good faith suggested and thought he could pay his creditors in less than three years, **he lost his right to a three year stay.** Neither the creditors nor the courts below can cheat the Frazier-Lemke Moratorium that easily. This court, we feel confident, will not put its stamp of approval on that procedure.

In *Borchard* v. *California Bank*, 1940, 310 U. S. 311, the farmer debtors and the mortgage holder consented in writing and the court upon their application ordered a procedure other than that in Section 75. This court held that such consent was not a waiver by the farmer debtors of and right under the statute. After the consent orders had been followed for four crop years they asked for the regular procedure as did Mr. Denney, the farmer debtor here. The bankruptcy court and the appellate court in the *Borchard* case and in this *Denney* case denied the farmer debtor's statutory right. There this court reversed the lower courts. Here it has denied certiorari.

V.

It seems difficult for some of the lower courts to comprehend and follow the repeated declarations of this court that the debtor has equal rights with the creditor to the consideration of the principles of equity and the purpose of Section 75. This court said in *John Hancock* v. *Bartels*, 308 U. S. 180, at 183 and 184:

> "We think that the District judge failed to follow the mandate of the statute. . . .
>
> Subsection (s) of Section 75 as amended by the Act of August 25, 1935, prescribes a definite course of procedure. That subsection applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts."

Pages 184 to 185: "**The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsection (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s).**"

Page 186: "Then it is provided, in paragraph (3), that at the end of the three-year period, or at any time before that, the debtor may pay into court the appraised value of the property. . . ."

Page 187: "The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved. See *Wright* v. *Vinton Branch, supra. Adair* v. *Bank of America*, 303 U. S. 350, 354-357; *Wright* v.

Union Central Life Insurance Co., 304 U. S. 502, 516, 517."

In *Borchard* v. *California*, 1940, 310 U. S. 311, at pages 316 to 317, this court declared:

"We are of opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of Section 75(s). That this is so is made plain by our decisions in *Wright* v. *Vinton Branch of Mountain Trust Bank*, (300 U. S. 440) and *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180. As was said in the latter case (p. 187):

'The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.'

That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of a stay which will assure him of his possession for three years from the date of the order, upon the conditions mentioned in the Act."

Page 317: "Instead of prosecuting the cause before the Conciliation Commissioner pursuant to the debtors' petition, the bank resorted to a procedure not contemplated by the statute, evidently on the theory that it could obtain some advantage by that course."

It is the record of history that when a law is passed for the benefit of the great mass of the people, its effects

are gradually annihilated by nibbling at it in the lower courts, state as well as federal, until the static prejudices of those courts entirely defeat the law by judicial legislation. This is true even though a new social principle is embodied in a statute and established as the "supreme law of the land". If such a principle is beneficial to farmers or laborers, but is unfavorably regarded by those who are the beneficiaries of long established special privileges, unremitting diligence and consistency is required on the part of this court "lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." *Wright* v. *Union Central*, 1940, 311 U. S. 273, 279. We think "eternal vigilance is the price of liberty" and without eternal vigilance Section 75 will continue to be mocked.

The most charitable way to put it is that it seems hard for some of the lower courts to understand that the debtor has rights equal in weight to those of creditors. "The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved. See *Wright* v. *Vinton* [300 U. S. 440]; *Adair* v. *Bank*, 303 U. S. 350, 354-357; *Wright* v. *Union Central*, 304 U. S. 502, 516, 517." Chief Justice Hughes in *John Hancock* v. *Bartels*, 1939, 308 U. S. 180, 187.

"We are of opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of Section 75(s). That this is so is made plain by our decisions in *Wright* v. *Vinton*

[300 U. S. 440] and *John Hancock* v. *Bartels*, 308 U. S. 180". Justice Roberts in *Borchard* v. *California Bank*, 1940, 310 U. S. 311, 316.

"This act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. *Wright* v. *Union Central* [304 U. S. 520], *John Hancock* v. *Bartels* [308 U. S. 180]; *Kalb* v. *Feuerstein*, 308 U. S. 433. Safeguards were provided to protect the creditors throughout the proceedings, to the extent of the value of the property. *John Hancock* v. *Bartels* [308 U. S. 180] at pages 186-187; *Borchard* v. *California Bank* [310 U. S. 311] at page 317. There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts and ambiguities in the Act be resolved in its favor and against the debtor." Justice Douglas in *Wright* v. *Union Central*, 1940, 311 U. S. 273, 278.

"Farmers can not be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes. *Cf. Borchard* v. *California Bank*, 310 U. S. 311. We think the *Bartels*, *Wright* and *Borchard* cases control our conclusion here" . . . Justice Black in *Wright* v. *Logan*, 1942, 315 U. S. 139, 142.

All the extraneous matters injected into this case by the respondent to bring confusion into the several opinions in the District Court, and into the opinion in the Appellate Court serve only to confuse and hide the real issue: **Did the failure of the farmer debtor to pay into court the value of the property as he thought he could do before the expiration of the three year stay empower the court to sell him out before the three year stay expired.**

VI.

But the national picture of the federal courts as a whole is not so black as that in the Seventh Circuit. In many circuits the spirit and purpose of Section 75 as determined by this court are faithfully followed.

For example we cite an opinion rendered within the past 30 days by a new judge in the Ninth Circuit. We refer to the case of *In re Loose,* D. Ct. California, dated September 28, 1943, reported in the Los Angeles Court Journal. The opinion is by Judge O'Connor until recently Comptroller of the Currency. There the conciliation commissioner issued an informal stay order which was never signed or entered. At the end of three years, during which the farmer debtor paid rental to the court, the mortgage holder sought the sale of the farm on the ground (1) that the farmer debtor had received the "equivalent" of a stay order, and (2) that he was "estopped" from claiming that no order had been entered.

The judge having no background of judicial bias or prejudice from the old conceptions of regular bankruptcy looked to the statute, to the decisions of this court and of the lower courts which have followed them, and to text discussions of the nature of court orders and of the office of referee in bankruptcy. He found that:

(1) Section 75(s)(1) provides that the court shall stay proceedings for three years.

(2) *Borchard* v. *California,* 1940, 310 U. S. 311, held that Section 75 provides an orderly procedure and the farmer debtor is entitled to compliance with that procedure. The unambiguous implication of this opinion requires a formal stay order to be entered.

(3) *John Hancock* v. *Bartels*, 1939, 308 U. S. 180, held that this orderly procedure includes the entry of a stay order which will assure the farmer debtor of his possession for three years.

(4) *Wright* v. *Union Central*, 1940, 311 U. S. 273, 279, held that the statute must be liberally construed lest its benefits be frittered away by narrow interpretations which disregard the letter and spirit of the Act.

(5) *Wright* v. *Logan*, 1942, 313 U. S. 139, 141, held that farmers can not be deprived of the benefits of the Act because the court believes they have already received its "equivalent."

(6) *Donald* v. *San Antonio Bank*, 1938, 100 Fed. (2d) 312, 314, held that the court in a farmer debtor case speaks only through an order signed and entered of record.

(7) *Paradise* v. *Federal Land Bank*, 1941, 118 Fed. (2d) 215, held that a bankruptcy court in a farmer debtor case may not enter a *nunc pro tunc* order.

(8) *In re J. & M. Doyle Co.*, CCA 3, 1942, 130 Fed. (2d) 340, 341, held that a verbal order is void because there is no record of it on which to rely to sustain it or oppose it.

(9) Remington on Bankruptcy states that referees act through orders and unless entered can not be reviewed.

This judge from his fresh review of the authorities concluded that "The three year stay period under Section 75(s)(1)(2) will not commence to run until a formal stay order is entered by the referee, as provided by said section."

CONCLUSION.

In short the Seventh Circuit has from the inception of the farmer debtor law repeatedly disregarded the letter and spirit of the statute; at the same time it enforced the spirit and purpose of the corporation debtor law; it has ignored the plain decisions of this court, being twice reversed on one point; its record of decisions under Section 75 stands out distinctly from the decisions of the other circuits of the nation; the farmer debtor in this instance, as generally in cases arising out of Section 75 in the Seventh Circuit, has been deprived of the benefits of Section 75 to which he is clearly entitled.

Only the corrective powers of this court will cause Section 75 to be observed in the Seventh Circuit.

Respectfully submitted,

Lima, Ohio
October 27, 1943

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Certificate of Counsel.

I certify that the foregoing petition for rehearing is filed in good faith and not for delay.

ELMER MCCLAIN,
Counsel for the Petitioner.